No. 24-440

IN THE

Supreme Court of the United States

HAROLD R. BERK,
Petitioner,

v.

WILSON C. CHOY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Berk v. Choy, M.D., et al.
U.S. District Court for the District of Delaware
(Case No. 1:22-cv-01506-RGA)

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

[FILED: November 18, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-1506

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

COMPLAINT

1. Plaintiff Harold R. Berk is a resident and citizen of the State of Florida who resides at 17000 SW Ambrose Way, Port St. Lucie, Florida 34986. He also owns, together with his wife, real property at 207 Samantha Drive, Lewes, Delaware 19958. Plaintiff was an attorney for 51 years and retired as of July 1, 2022.

2. Defendant Wilson C. Choy, M.D. is a licensed physician in and a citizen of the State of Delaware, who maintains offices at 8 N. Race Street, Georgetown, Delaware 19947.

3. Defendant Beebe Medical Center, Inc., is a Delaware corporation with offices, and facilities

located at 424 Savannah Road, Lewes, Delaware 19958, and it employs physicians, nurses and technical staff and consulting physicians who provide medical care and treatment, and it is a licensed medical provider facility in Delaware.

4. Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC, is a Delaware corporation which maintains and operates rehabilitation hospital facilities located at 250 Hampden Road, Middletown, Delaware 19709 and it is a licensed rehabilitation hospital in Delaware.

5. This is an action for damages against each of the defendants for medical malpractice and negligence by causing additional injury to plaintiff beyond the ankle injury presented on Beebe Hospital admission and failing to properly examine, test, diagnose and treat the fractures of plaintiffs left leg and failing to follow ordered limitations on weight bearing.

6. This Court has jurisdiction over this matter under 28 U.S.C. §1332 as the matter is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. Plaintiff gave defendants notice of his claims by letter dated January 15, 2021, and he further gave them notice, by a letter dated August 11, 2022, and sent by certified mail, of his intent to further investigate under 18 Del. Code §6856 (4) which provides a ninety-day extension of the two-year Statute of Limitations. Copy of the letter attached as Exhibit 1.

7. Venue is proper in this Court as each of the defendants maintains offices and their principal place of business in Delaware.

FACTS

8. On August 20, 2020, plaintiff fell out of bed and severely injured his left ankle and foot. He was taken by fire ambulance to the emergency room at defendant Beebe Hospital owned and operated by defendant Beebe Medical Center, Inc. ("Beebe").

9. Plaintiff was taken to the emergency department where his injury was examined by doctors, nurses and other personnel employed by defendant Beebe, and X-rays were taken of his left ankle and foot.

10. A radiologist employed by defendant Beebe, Kimberly Gardner, M.D., examined the films from the Xrays, and in her report she stated her findings:

> There is a mildly displaced fracture of the distal tibia involving the medial malleolus and posterior cortex. There is a mildly comminuted nondisplaced fracture of the distal fibula centered approximately 6 cm above the tibial plafond. There is mild widening at the ankle mortise, concerning for underlying ligamentous injury. The talar dome is smooth. Bone mineralization is within normal limits. No radiopaque foreign body in the soft tissues.
>
> Impression:
>
> 1. Mildly displaced fracture of the distal tibia as described.
> 2. Nondisplaced comminuted fracture of the distal fibula as described.

11. According to the Beebe medical records, there was a consultation with defendant Wilson Choy, M.D. on the same date, August 20, 2020, and the Beebe

medical records state under a heading DOCTOR NOTES:

> Discussed with Dr. Choy and imaging results reviewed by him.
>
> Recommends splint, non-wt. bearing on affected side. f/u in the office next week. After additional discussion with Dr. Choy, due to pt.' chronic lower extremity wounds requiring wound center evaluation and dressing changes q 1-2 days, will place in CAM boot instead of orthoglass splint. Noted that pt's spouse and myself with concerns regarding his ambulatory status prior to injury, now with ankle fx/NWB status and pt. with reported chronic difficulties on contralateral side. AM meds ordered, plan to have PT eval. Pt. to determine if safe to go home with resources vs. alternative dispo plan. (Pg. 31 Beebe records).

12. Under a heading of RE-EVALUATION NOTES, under the heading of DOCTOR NOTES, it states:

> Plan is for physical therapy evaluation pending discharge plan.
>
> Patient still with pain and unable to complete physical therapy evaluation. Concern for possible cellulitis, patient started on Ancef. **Unable to tolerate CAM boot secondary to open wounds.** Fiberglass posterior splint placed in order to stabilize joint and avoid contact with open wounds with slight improvement of pain. (Pg. 31 Beebe records) (emphasis added).

13. When the nurses and staff in the Beebe emergency department ("ED") attempted to put on the CAM boot, they twisted and turned plaintiff's left leg it and manipulated it in various directions attempting to get the CAM boot on plaintiff's leg, but by doing so they significantly altered the fractured ankle by their manipulation, twisting and turning. After they did push the CAM boot in place, plaintiff was in intense pain and, after repeated complaints of extreme pain and crying, they finally removed the boot. The Beebe medical records confirm that plaintiff "could not tolerate the CAM boot." But no new Xray was taken in the emergency department after the attempt to put on the CAM boot despite the severe pain it caused plaintiff by the twisting and turning of the fractured left leg.

14. After staff in the emergency department struggled to put on the CAM boot, plaintiff was administered Dilaudid (Hydromorphone), an opiod pain reliever rated by the US Drug Enforcement Agency as "2-8x times more potent than morphine but shorter duration and greater sedation" "and has a rapid onset of action" (Pg. 33 Beebe records) (DEA Hydromorphone Fact Sheet).

15. Beebe ED nursing staff requested plaintiff do physical therapy only four hours after admission which plaintiff declined due to extreme pain in left leg. (Pg. 356 Beebe records).

16. Dr. Choy visited plaintiff for the first time at Midnight on August 20, 2020, and he advised that plaintiff did not require surgery for either the tibia or fibula fracture and that splinting or a CAM walker was all that was required, plaintiff should be non-weight bearing on left leg and "follow-up in two weeks

to repeat Xrays of left ankle." (Pg. 43 Beebe records signed by Dr. Choy at 11:59 pm August 20, 2020).

17. Apparently, Dr. Choy did not consult with the ED staff regarding their efforts to twist and turn the CAM boot that morning which resulted in the need to administer Dilaudid to plaintiff.

18. At some places in the Beebe records it states that plaintiff was to follow-up for Xrays with Dr. Choy in one week and other places it says two weeks.

19. Plaintiff was administered Oxycodone, another opiod based pain reliever, throughout his hospitalization at Beebe to reduce the severe pain he felt from the left leg injury.

20. The Beebe records state that plaintiff was to see Dr. Choy within two weeks or by September 6, 2020. (Pg. 234 Beebe records).

21. At no time prior to plaintiff's discharge from Beebe on August 23, 2020 was any additional Xray taken of plaintiff's leg besides the Xray taken on admission on August 20, 2020.

22. Beebe arranged a placement for plaintiff at Encompass Rehabilitation Hospital in Middletown, Delaware, owned by defendant Encompass Health Rehabilitation Hospital of Middletown, LLC ("Encompass").

23. While at Encompass plaintiff noticed a deformity in the positioning of his left leg as it was oriented to the left, and he pointed this out to staff at Encompass, but no Xray was taken of the left leg at Encompass despite the fact that there was a hospital immediately across the road from the Encompass facility.

24. Encompass had plaintiff engage in various physical and occupational therapy exercises including

one where plaintiff was required to pull himself up into a standing position on parallel bars. This activity required plaintiff to be partially weight bearing on his left leg despite Beebe's orders to the contrary.

25. Page 379 of the Encompass records states,

> Plan the patient is to be nonweightbearing in the left lower extremity continue aggressive physical therapy mobilization DVT prophylaxis. Follow-up with primary orthopedic surgeon.

26. To plaintiffs knowledge, at no time during his hospitalization at Encompass did any staff person, nurse or doctor contact defendant Dr. Choy regarding plaintiff's condition or his perceived leg deformation.

27. Page 392 of Encompass records states that plaintiff is to be nonweight bearing for eight weeks, and this is exactly what Dr. Choy stated orally to plaintiff when they met at Midnight on August 20, 2020.

28. Page 522 of the Encompass records states as of August 26, 2020:

> Per physical therapy, patient had complaints of pain and concern regarding positioning of left ankle and splint. Ace wrap removed, splint noted to be aligned with heel, foot and calf, however foot does appear to be somewhat rotated externally. Ace wrap reapplied and patient concerns/ appearance of leg discussed with Dr. Khandewal.

29. To plaintiff's knowledge Dr. Khandewal did not examine the positioning of plaintiff's left leg nor did he contact Dr. Choy regarding the leg positioning.

30. Page 793 of the Encompass records states, "Educated that pt. had trialed (sic) standing in parallel bars in morning PT session today and was able to lift up buttocks but not yet achieving full standing position." This PT exercise was required even though it required plaintiff to be partially weight bearing on his left leg.

31. Page 801 of the Encompass records states that plaintiff received training in wheelchair operation and, on September 3, 3020, was handed a brochure describing types of ramps and measuring for them, but when plaintiff's wife contacted the ramp constructing company recommended by Encompass, they said they could not do a ramp at our house.

32. Plaintiff was discharged from Encompass on September 7, 2020 and taken by ambulance company to his house in Lewes, Delaware, but since plaintiff and his wife were not able to get a ramp constructed in the three days prior to discharge, three employees of the ambulance company had to carry plaintiff in his wheelchair into the house.

33. As soon as plaintiff and his wife got a local contractor to construct a ramp, plaintiff left their house, using a wheelchair, and went on or about September 15, 2020 to the offices of defendant Dr. Choy in Georgetown, Delaware.

34. Dr. Choy's physician's assistant had an Xray taken of plaintiff's left ankle and advised plaintiff that his left leg was severely deformed and the bones were actually going in three different directions. After he consulted with Dr. Choy over the telephone,

as Dr. Choy was not present for plaintiff's appointment, the physician's assistant now told plaintiff that he required immediate surgery due to the now deformed ankle and leg, but Dr. Choy would not perform the surgery due to plaintiff's known heart conditions.

35. Plaintiff requested that Dr. Choy provide him a copy of his medical records concerning the Xray showing the deformities, but though a request was made for the records in January, 2021 and repeated again and most recently on November 8, 2022, defendant has not provided those office records to plaintiff.

36. Plaintiff then contacted the head of the ankle and foot practice at Rothman Institute, Dr. Steven Raikin, and an appointment was promptly arranged.

37. Plaintiff met with Dr. Raikin on September 23, 2020, and when Dr. Raikin reviewed the Xrays taken at Dr. Choy's office, he was very upset with what he saw, as the Xray showed a major deformity of the left ankle.

38. Dr. Raikin's medical notes of September 23, 2020 state the following:

> Today's visit was a 60-minute plus face-to-face evaluation more than 50% of which discussed the complexity of his current problems combining his medical comorbidities and his unstable trimalleolar ankle fracture with tenting of the skin and a precarious open fracture configuration. Treatment options at this time include either repeat attempted manipulation and splinting or attempted casting with concerns regarding this becoming an open fracture, inability to maintain alignment, nonunion,

deformity, and risk for ulcerative infection. The next alternative would be to go to the operating room and do an open reduction internal fixation with high risk for wound complications based on his skin quality around the ankle region. The final option would be to go to the operating room and do a more limited open reduction and definitive stabilization with a multiplane external fixator to hold the ankle in alignment while healing or at least long enough to allow medical optimization and preanesthetic clearance. I discussed these options with the patient and his wife. They have elected to proceed with the external fixation option which I think is the right management. This would depend on medical optimization and preanesthetic clearance. We did contact his cardiologist at Jefferson today Dr. Bravetti who has agreed to accept him into his service. Today. Prior to this I personally manipulated the fracture into an improved alignment to take the pressure off the medial malleolus and personally applied a well-padded posterior and U-splint to the region. Patient would like to proceed with the surgery. I discussed the surgical procedure, including but not exclusively related to the patients comorbidities, the post operative rehabilitation, the operative and non operative alternatives and the risks and benefits of these alternative options, as well as the expected prognosis of the above-mentioned procedure with the patient in detail. ... [risks] ... Additionally, the post operative pain protocol was discussed, with

> an emphasis on minimizing the use of narcotic medications. ... [patient understanding] ... In my medical opinion, the patient has an orthopedic problem that requires surgical intervention and that is now time sensitive.

39. Plaintiff was immediately taken to Jefferson Hospital in Philadelphia and admitted on September 23, 2022.

40. After procedures and medications to reduce fluid in plaintiff's lungs and to obtain an opinion from Dr. Bravetti on suitability for surgery, Dr. Raikin performed the surgery, manipulating the bones of the ankle into better position and installing the external fixator as discussed.

41. Plaintiff was discharged to home about a week later.

42. Though necessary, the external fixator was very difficult and pain inducing. Plaintiff could not straighten his leg, and the large external rods and clamps made it difficult to lie in bed as it was very difficult to move plaintiffs leg with the external fixator attached.

43. The external fixator caused daily pain while lying in bed. When plaintiff's wife drove him places, he had to lift his leg off the floor of the car if he saw a bump ahead as the impact to a bump was transmitted by the external fixator into the bone causing pain and agony.

44. Plaintiff attended sessions at the Beebe wound management service to treat his leg ulcers caused by chronic venous insufficiency and to treat the left leg after surgery.

45. Plaintiff also had home wound care, physical and occupational therapy, but there was little plaintiff could do in the way of physical therapy while the external fixator was attached.

46. Though Dr. Raikin did not want plaintiff to take narcotic pain relievers, there was constant pain with the external fixator and plaintiff had to do the best he could with over the counter pain relievers.

47. After four months with the external fixator, plaintiff was readmitted to Jefferson Hospital in late January, 2021 to remove the external fixator, and Dr. Raikin did remove it at that time.

48. Plaintiff was then discharged from Jefferson after about a week and was taken directly to Magee Rehabilitation Hospital in Philadelphia for physical and occupational therapy. Plaintiff was still non-weight bearing, and at first he was transferred from the bed to a wheelchair in a mechanical hoist device, but later he was trained in use of transfer boards to get from the bed to a wheelchair.

49. With the extensive and expert physical and occupational therapy at Magee, and after Dr. Raikin permitted him to be weight bearing in March, 2021, plaintiff was able to walk short steps using a walker. Plaintiff continued to gain strength at Magee.

50. Plaintiff was discharged from Magee on or about March 15, 2021, and he then commenced physical and occupational therapy at Elite Rehab in Rehoboth, Delaware. For the first months, plaintiff arrived at Elite in a wheelchair.

51. Elite Rehab also did expert physical and occupational therapy. Gradually, they improved his walking ability, his use of a walker and cane, and after about

seven months of physical therapy at Elite, plaintiff was able to walk short distances using a cane.

52. Plaintiff still, as of November, 2022, has balance problems and some weakness in the legs, and he must still use a cane for balance and mobilization.

FIRST CAUSE OF ACTION— MEDICAL NEGLIGENCE BEEBE MEDICAL CENTER, INC.

53. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 52 above.

54. Beebe, and its physicians, nurses, physicians' assistants and employees owed plaintiff a duty to diagnose and treat plaintiff according to the appropriate medical standard of care.

55. Though the one and only Xray of plaintiff's left ankle taken by Beebe showed what the radiologist described as a mild fracture of the tibia and fibula, Beebe's employees in its emergency department, undertook to and did manipulate, turn and twist plaintiff's leg in order to make several efforts to install a CAM boot on plaintiff's leg, but in doing so they deformed, injured, and aggravated the fractures causing them to be more severe.

56. As the Beebe emergency department personnel manipulated, turned and twisted the boot on plaintiffs leg, he was caused great and severe pain and discomfort and cried out in pain at the continued twisting and turning of his leg and which extreme pain continued as long as the ED personnel kept the CAM boot in place.

57. Plaintiff's pain was so severe that the Beebe emergency department personnel had to administer several doses of Dilautid (hydromorphone), a powerful

pain reliever that is 2 to 8 times more powerful than morphine according to the Drug Enforcement Agency.

58. The actions of the Beebe emergency department personnel aggravated the ankle fractures deemed minor on admission which were now were severe injuries to plaintiffs ankle and more severe than the condition of the leg when the initial and only Xray was taken at 5:30 a.m. after admission to the hospital.

59. Despite the fact that plaintiff was in severe pain and discomfort as a result of the emergency personnel actions, no one at Beebe ordered any additional Xrays of the ankle after the manipulation, turning and twisting of the leg performed by the emergency department personnel.

60. Beebe did not do an additional Xray of plaintiff s leg prior to discharge on August 23, 2020 despite the fact that the emergency department personnel caused additional injury to plaintiffs leg, which injury should have been known to them by plaintiff crying out in pain and requiring hydromorphone to reduce the pain level.

61. Beebe's actions in causing additional injury and not doing a post injury Xray was not in accordance with the standard of care of a medical hospital licensed in Delaware.

62. The failure to do a post-admission Xray also deprived medical staff of Beebe with important information they should have obtained regarding the actual condition of plaintiff's leg at the time of discharge. The actual condition was only revealed when Dr. Choy's staff did an Xray at his office in September, 2020, which Xray was reviewed by Dr. Raikin on September 23, 2020 showing a major

deformity of the leg as he described in his notes and which required emergency attention.

63. Defendant Beebe caused additional injury and magnified the injury to plaintiffs ankle, and caused additional injury by not doing a follow-up Xrays, all of which is below and not in accordance with the standard of care for physicians and hospital facilities in Delaware.

64. As a proximate result of defendant Beebe's aggravating and worsening plaintiffs ankle injury, plaintiff was caused to suffer pain, suffering and discomfort then and for years thereafter, and it has caused plaintiff to incur medical expenses for care and treatment by Dr. Raikin, Rothman Institute, Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

WHEREFORE, plaintiff prays that judgment be entered in his favor for compensatory damages in an amount in excess of $75,000.

SECOND CAUSE OF ACTION— MEDICAL NEGLIGENCE WILSON C. CHOY, M.D.

65. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 64 above.

66. Defendant Choy reviewed the initial Xray of plaintiff's leg taken at 5:30 a.m. on August 20, 2020, but he failed to order any additional Xrays after the emergency department personnel turned and twisted and manipulated the CAM boot, prescribed by defendant Choy, on plaintiff's leg aggravating and increasing the instability of the fracture of the tibia and fibula as described is Dr. Raikin's notes.

67. Though the emergency department personnel included notes of their efforts to put the CAM boot on

plaintiff and the severe pain caused by the CAM boot which they concluded plaintiff could not tolerate, and which notes show the administration of hydromorphone, defendant Choy failed to order any additional Xrays of plaintiffs ankle. Dr. Choy's failure to order additional Xrays in order to properly diagnose and treat plaintiffs ankle was below the standard of care required of licensed physicians in Delaware.

68. Defendant Choy's diagnosis and treatment orders for plaintiff were incorrect in light of the aggravation of the ankle injury by the emergency department personnel, of which he was apparently unaware, and the failure to properly examine, test, diagnose and order treatment for plaintiff's ankle was below the standard of care for physicians licensed in Delaware.

69. Though the emergency department notes stated they had to administer multiple doses of hydromorphone to plaintiff after they twisted, turned and manipulated his leg, defendant Choy was negligent in not reviewing those notes or questioning the emergency department personnel about what happened.

70. When defendant Choy saw plaintiff at Midnight he was apparently unaware of the emergency department actions and failed to question them on what occurred.

71. Defendant Choy told plaintiff that he did not require surgery, but he offered no explanations for that conclusion. In light of plaintiff's actual condition, as revealed in the Xray taken at Dr. Choy's office a month later, and as discussed in Dr. Raikin's notes, Dr. Choy's failure to properly examine and diagnose plaintiffs actual condition and order required medical treatment and surgery, was beneath the standard of care for a licensed physician in Delaware.

72. As a direct and proximate result of defendant Choy's failure to accurately diagnose and treat plaintiff while he was at Beebe, and then sending him for physical therapy at Encompass, without proper required treatment, plaintiff was caused to endure additional pain and suffering by the aggravation of the initial injury, and it caused plaintiff to incur additional medical expenses for care and treatment by Dr. Raikin, Rothman Institute, Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

73. Defendant Choy told plaintiff at Midnight on August 20, 2020 that he did not require surgery, would have stabilization of the leg by a splint and needed to stay non-weight bearing for only eight weeks, but none of his treatment plan was accurate or in accordance with medical standards in light of the additional injuries that would have been revealed if an Xray were ordered by Dr. Choy and taken at Beebe before discharge.

WHEREFORE, plaintiff prays that judgment be entered in his favor and against defendant Wilson Choy, M.D. for compensatory damages in an amount in excess of $75,000.

THIRD CAUSE OF ACTION— MEDICAL NEGLIGENCE ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC

74. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 73 above.

75. Defendant Encompass received extensive medical records from Beebe on plaintiff's admission regarding his examination and treatment at Beebe.

76. Defendant Encompass knew that plaintiff was to be non-weight bearing on his left leg, but nevertheless they directed him to multiple times attempt to stand up on both legs using parallel bars. This required plaintiff to apply weight to the left leg in order to stand or attempt to stand which was contraindicated by Beebe's orders and notes.

77. Plaintiff also observed on August 26, 2020 to nurse Michael Labaraca that his left leg was improperly positioned, and nurse Labaraca wrote that the "foot does appear to be somewhat rotated externally" and that he would discuss it with Dr. Khandelwal, but Dr. Khandelwal failed to examine plaintiff's leg, he did not write any note that he performed any examination and he did not contact Dr. Choy.

78. Defendant Encompass did not perform an Xray of plaintiffs leg, and they did not take him to the hospital across the street to have an Xray taken.

79. Defendant Encompass is a licensed health care provider in Delaware, but it failed to meet the standard of care applicable to a rehabilitation hospital in that it ordered plaintiff to perform a physical therapy exercise that required him to be weight bearing against orders, Dr. Khandelwal did not follow-up on the report of the rotated positioning of plaintiff's leg, and he did not order an Xray of plaintiff's leg despite the report of nurse Labaraca and he had extensive records on the care and treatment of plaintiff at Beebe where additional injury to the ankle occurred.

80. As a direct and proximate result of the failure of Encompass to meet the required medical standard of care, plaintiff was caused to suffer additional pain

and suffering and incur additional medical expenses for care and treatment by Dr. Raikin, Rothman Institute, Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

WHEREFORE, plaintiff prays that judgment be entered in his favor and against defendant Encompass Health Rehabilitation Hospital of Middletown, LLC for an amount in excess of $75,000.

Respectfully submitted,

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[FILED: November 18, 2022]

DECLARATION

Plaintiff Harold R. Berk hereby declares, under penalty of perjury, that the above and foregoing statements are true and correct to the best of his knowledge, information and belief.

/s/ Harold R Berk
Harold R Berk, Plaintiff Pro Se

[FILED: November 18, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-1506

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

MOTION TO EXTEND TIME FOR FILING
MEDICAL EXPERT OPINION

Plaintiff Harold R. Berk moves this Honorable Court, pursuant to 18 Del. Code §6853(a)(2), to extend the time for the filing of an Affidavit of Merit, as required by 18 Del. Code §6853, for medical malpractice negligence actions under the laws of Delaware, and in support of the Motion, he shows the Court the following:

1. The initial injury in this medical malpractice negligence case occurred on August 20, 2020 in Lewes, Delaware.

2. Plaintiff sent a letter to each of the defendants on January 15, 2021 notifying them of his claims and requesting copies of relevant medical records. Plaintiff did not receive all the needed medical records, so on August 11, 2022, plaintiff sent a letter to each defendant by certified mail return receipt requested, pursuant to 18 Del. Code §6856 (4), stating that he needed additional time to investigate his claims, he requested needed records from the defendants, and pursuant to that section the two-year Statute of Limitation was extended for ninety (90) days. A copy of the August 11, 2022 letter is attached hereto as Exhibit 1.

3. Plaintiff did receive some additional records from defendant Beebe Medical Center, Inc., but he has not received any medical records from defendant Wilson C. Choy, M.D.

4. On November 8, 2022, plaintiff sent a letter by fax to defendant Choy again asking him for his medical records. Defendant Choy's office took an Xray of plaintiff's ankle on or about September 15, 2020, and that Xray showed a serious deformation of the fractured ankle which defendant Choy, through his physician assistant, now stated required immediate surgery, which Dr. Choy was unwilling to perform.

5. Dr. Choy's office gave plaintiff a copy of the Xray taken in the office which plaintiff then took to Steven Raikin, M.D., the head of the ankle and foot practice at the Rothman Institute,

6. However, defendant Choy never provided plaintiff with his medical notes on his review of the Xray taken in his office and his reasons for refusing to perform surgery on plaintiff's ankle despite his physician's assistant stating to plaintiff that he now

needed immediate surgery. Nor did defendant Choy provide plaintiff with any explanation of the dramatic disparity between the initial Xray at Beebe Hospital on August 20, 2020 and the subsequent Xray taken at Dr. Choy's office in September, 2020.

7. Plaintiff had anticipated obtaining a medial opinion from Dr. Raikin, but plaintiff learned in October, 2022 that Dr. Raikin had retired from medical practice due to his personal health conditions, and plaintiff inadvertently learned from his own doctor at the Hospital of the University of Pennsylvania that Dr. Raikin had recently had a lung transplant.

8. Plaintiff then contacted Dr. David Pedowitz at the Rothman Institute who had recently taken over Dr. Raikin's practice, but he needs additional time to review medical records, including Dr. Choy's medical records, which plaintiff does not have, before he can issue a medical opinion.

9. 18 Del. Code §6853(a)(2) provides that for good cause shown, the Court can grant plaintiff an additional sixty (60) days to obtain a medical opinion or affidavit of merit.

WHEREFORE, plaintiff moves the Court, pursuant to 18 Del Code §6853(a)(2), to grant him sixty (60) days to obtain the affidavit of merit.

/s/ Harold R. Berk
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[FILED: November 23, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-1506

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE AFFIDAVIT OF MERIT

Plaintiff has moved the Court, pursuant to 18 Del. Code §6853(a)(2), for an extension of time, not to exceed sixty (60) days, in which he may file an Affidavit of Merit as is required for a medical malpractice action under 18 Del. Code §6853. Section 6853(a)(2) provides:

> The court may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to

obtain, despite reasonable efforts, relevant medical records for expert review.

Plaintiff requested defendants to provide medical records by letter of January 15, 2021 and by subsequent letters. Defendants Beebe Medical Center, Inc. and Encompass Health Rehabilitation Hospital of Middletown, LLC have provided plaintiff with their medical records, but defendant Wilson C. Choy, M.D. has not provided plaintiff with his office records or notes regarding the Xrays taken in his office on or about September 15, 2020 which showed a dramatic deterioration in plaintiff's ankle from the Xrays taken on plaintiff's admission to Beebe Hospital on August 20, 2020.

Plaintiff has sent several letters to defendant Choy seeking those office records, the most recent letter being sent by fax on November 8, 2022, but plaintiff has still not received defendant Choy's office records and notes.

Plaintiff was examined and treated by Dr. Steven Raikin at the Rothman Institute, the physician who performed his ankle surgery and did follow-up review, but Dr. Raikin recently retired from medical practice due to personal health problems which may have included a lung transplant. Dr. Raikin's practice at Rothman Institute has been taken over by Dr. David Pedowitz, and plaintiff has seen Dr. Pedowitz once, but he has not yet had sufficient time to review the available medical records in order to issue an affidavit of merit.

For these reasons, plaintiff seeks a sixty (60) day extension of the time in which he must submit an affidavit of merit in this medical malpractice action.

Respectfully submitted,

/s/ Harold R. Berk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-1506 - RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D.,
BEEBE MEDICAL CENTER, INC., AND ENCOMPASS
HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN,
LLC,

Defendants

ORDER

AND NOW, this 23 day of Nov., 2022, the plaintiff Harold R. Berk having moved for an Order extending the time in which he may present a medical opinion with affidavit of merit, and the Court having been advised in the premises, the said Motion is hereby GRANTED, and

IT IS ORDERED, that plaintiff Harold R. Berk shall have an extension of time in which to file an affidavit of merit in this medical malpractice case to and including January 23, 2023.

/s/ Richard G. Andrews
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 1:22-cv-1506 RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHAOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

TRIAL BY JURY DEMANDED

ANSWER OF DEFENDANT WILSON C. CHOY, M.D.

1. Answering defendant has no knowledge or information sufficient to form a belief as to the truth of all the averments of this paragraph of the Complaint. Having said that, at this point answering defendant does not have any information to the contrary.

2. Admitted.

3. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party.

4. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party.

5. Admitted that this is an action for damages as described by the Plaintiff but denied that there was any substandard care provided by the answering defendant. By way of further response, all allegations of wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

6. The first sentence is admitted. It is also admitted that a copy of a letter dated August 11, 2022, as described in this paragraph is attached. The cited statute speaks for itself.

7. Admitted.

FACTS

8. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

9. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

10. The allegations in this paragraph of the Complaint are admitted solely to the extent that they

are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

11. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

12. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

13. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

14. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

15. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

16. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

17. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

18. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

19. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

20. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

21. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are

denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

22. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

23. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

24. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

25. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and

discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

26. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

27. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

28. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

29. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

30. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. D'Ambrosio, the same are denied.

31. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

32. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

33. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

34. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

35. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

36. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are

denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

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39. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

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discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

41. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

42. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

43. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

44. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

45. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

46. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

47. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

48. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

49. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

50. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

51. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are

denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

52. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

FIRST CAUSE OF ACTION – MEDICAL NEGLIGENCE BEEBE MEDICAL CENTER[1]

53. The allegations in paragraphs 1 through 52 are incorporated by reference as though set forth in full.

54. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

55. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

56. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers

[1] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint.

any wrongdoing on behalf of Dr. Choy, the same are denied.

57. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

58. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

59. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

60. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

61. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

62. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

63. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

64. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

SECOND CAUSE OF ACTION – MEDICAL NEGLIGENCE WILSON C. CHOY M.D.[2]

65. The allegations in paragraphs 1 through 64 are incorporated by reference as though set forth in full.

66. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

67. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

[2] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint. Denied.

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

68. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

69. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

70. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

71. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

72. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

73. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

THIRD CAUSE OF ACTION –
MEDICAL NEGLIGENCE ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC[3]

74. The allegations in paragraphs 1 through 73 are incorporated by reference as though set forth in full.

75. The allegations in this paragraph of the Complaint are manifestly intended to be answered by

[3] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint.

another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

76. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

77. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

78. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

79. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

80. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

81. The complaint is barred by relevant statute of limitations.

SECOND AFFIRMATIVE DEFENSE

82. On its face, the allegations fail to state a claim upon which punitive damages may be assessed.

THIRD AFFIRMATIVE DEFENSE

83. Any negligence was on the part of another party of which Answering Defendant is not responsible for and/or beyond its control.

FOURTH AFFIRMTIVE DEFENSE

84. Plaintiff's own negligence exceeds Answering Defendant's alleged negligence and his claims are barred and/or damages should be reduced under the applicable comparative negligence statutes.

FIFTH AFFIRMATIVE DEFENSE

85. Plaintiff failed to mitigate his damages.

SIXTH AFFIRMATIVE DEFENSE

86. Any negligence was on the part of another party which was a superseding and/or intervening cause of Plaintiff's injuries.

SEVENTH AFFIRMATIVE DEFENSE

87. Answering Defendant adopts and reserves the right to set forth any affirmative defenses plead by another party in this case.

EIGHTH AFFIRMATIVE DEFENSE

88. Answering Defendant specifically reserves the right to set forth additional affirmative defense as revealed by discovery.

CROSS-CLAIMS

89. The Answering Defendant cross-claims against his co-defendants solely for the purpose of permitting the finder of fault to apportion fault if any fault is

found, *Ikeda v. Molock*, Del. Supr., 603 A.2d 785 (1991) and, in the applicable case, to permit the Answering Defendant to seek contribution, reduction, etc. pursuant to the provision of any joint tortfeasor release, which in the future, may be executed by Plaintiff.

ANSWER TO ALL PRESENT AND FUTURE CROSSCLAIMS

90. Answering Defendant denies all cross-claims now or hereinafter asserted against him.

WHEREFORE, Dr. Choy demands that the Plaintiff's claims for relief be denied and that judgment be entered in his favor plus costs.

ELZUFON, AUSTIN & MONDELL, P.A.

/s/ Matthew P. Donelson
JOHN A. ELZUFON – I.D. #177
MATTHEW P. DONELSON – I.D. #4243
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181
jelzufon@elzufon.com
mdonelson@elzufon.com

Counsel for Defendant Wilson C. Choy, M.D.

Dated: January 12, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 1:22-CV-01506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHAOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

TRIAL BY JURY OF 12 DEMANDED

ANSWER OF DEFENDANT, BEEBE MEDICAL CENTER, INC., TO PLAINTIFF'S COMPLAINT WITH AFFIRMATIVE DEFENSES AND CROSSCLAIMS

1. Beebe Medical Center, Inc., hereinafter "Defendant" or "Answering Defendant", is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

2. The averments in paragraph 2 are directed to another defendant, therefore, no response is required from Answering Defendants. To the extent that a response is required, Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph,

while at all times expressly denying all allegations of wrongdoing, whether express or implied.

3. Admitted in part. Denied in part. It is admitted that Beebe Medical Center, Inc. is a corporation in the State of Delaware with offices located at 424 Savannah Road, Lewes, Delaware 19958. It is further admitted that Beebe Medical Center, Inc. is a licensed health care provider in Delaware. Without specificity as to the identity of the "physicians, nurses and technical staff and consulting physicians to whom he refers, Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the remainder of the averments in this paragraph.

4. The averments in paragraph 4 are directed to another defendant, therefore, no response is required from Answering Defendants. To the extent that a response is required, Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph, while at all times denying all allegations of wrongdoing, whether express or implied.

5. Allegations of medical malpractice, negligence, causation and any wrongdoing whatsoever, whether express or implied, are denied by Answering Defendant. Answering Defendant further denies Plaintiff's alleged entitlement to compensatory damages.

6. The allegation in paragraph 6 are conclusions of law, to which no response is required. To the extent that a response is required, Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph, while at all times denying all allegations of wrongdoing, whether express or implied.

7. Admitted that Answering Defendant maintains offices in Delaware, and that Delaware is its principal place of business. Otherwise, Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining averments in this paragraph.

FACTS

8. Admitted that Plaintiff was examined in the emergency department of Beebe Medical Center Inc. on August 20, 2020. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining averments in this paragraph, while at all times denying all allegations of wrongdoing, whether express or implied.

9. Admitted that Plaintiff was examined in the emergency department of Beebe Medical Center Inc. on August 20, 2020. Also admitted, to the extent demonstrated by the the relevant medical record, that x-rays were taken. Otherwise, denied. Without specificity as to the identity of the "doctors, nurses and other personnel" to whom he refers, Answering Defendant is without information or knowledge sufficient to admit or deny the remaining averments in this paragraph, while at all times denying all allegations of wrongdoing, whether express or implied.

10. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of employment or agency whether express or implied, are denied.

11. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied.

Allegations of agency and/or wrongdoing, whether express or implied, are denied by Answering Defendant.

12. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of agency and/or wrongdoing, whether express or implied, are denied by Answering Defendant.

13. Denied.

14. The administration of Dilaudid is admitted, to the extent proven by relevant medical records and/or subsequent discovery. Otherwise, denied.

15. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

16. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

17. Denied that there were "efforts to twist and turn the CAM boot" that "resulted in the need to administer Dilaudid." Allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

18. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

19. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

20. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

21. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

22. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

23. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

24. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendant.

25. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

26. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

27. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

28. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

29. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

30. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

31. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

32. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

33. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

34. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

35. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

36. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

37. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

38. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

39. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

40. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

41. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

42. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

43. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

44. Admitted solely to the extent that the allegations in this paragraph are proven by relevant medical records and/or subsequent discovery. Otherwise, denied. Allegations of wrongdoing and/or causation,

whether express or implied, are denied by Answering Defendant.

45. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

46. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

47. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

48. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

49. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

50. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

51. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

52. Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in this paragraph.

FIRST CAUSE OF ACTION

53. The responses of Answering Defendant to the allegations in paragraphs 1 through 52 are incorporated herein by reference as if the same were set forth at length.

54. Denied as stated. Any duty of Answering Defendant is determined by Delaware law. Allegations of wrongdoing, whether express or implied, are denied by Answering Defendants.

55. Denied.

56. Denied.

57. The administration of Dilaudid is admitted, to the extent proven by relevant medical records and/or subsequent discovery. Otherwise, Answering Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining averments in this paragraph. Allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendants.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

WHEREFORE, Defendant, Beebe Medical Center, Inc., denies all liability, demands the Complaint of Plaintiff be dismissed with prejudice, and judgment be entered in favor of Answering Defendant and against Plaintiff, together with costs and such other relief as the Court deems appropriate. Answering Defendant demands a jury trial by twelve on all issues.

SECOND CAUSE OF ACTION

65. The responses of Answering Defendant to the allegations in paragraphs 1 through 64 are incorporated herein by reference as if the same were set forth at length.

66. The averments in paragraph 66 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

67. The averments in paragraph 67 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

68. The averments in paragraph 68 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

69. The averments in paragraph 69 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

70. The averments in paragraph 70 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

71. The averments in paragraph 71 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

72. The averments in paragraph 72 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

73. The averments in paragraph 73 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

WHEREFORE, Defendant, Beebe Medical Center, Inc., denies all liability, demands the Complaint of Plaintiff be dismissed with prejudice, and judgment be entered in favor of Answering Defendant and against Plaintiff, together with costs and such other relief as the Court deems appropriate. Answering Defendant demands a jury trial by twelve on all issues.

THIRD CAUSE OF ACTION

74. The responses of Answering Defendant to the allegations in paragraphs 1 through 73 are incorporated herein by reference as if the same were set forth at length.

75. The averments in paragraph 75 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a

response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

76. The averments in paragraph 76 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

77. The averments in paragraph 77 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

78. The averments in paragraph 78 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

79. The averments in paragraph 79 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

80. The averments in paragraph 80 are directed to another defendant, therefore, no response is required from Answering Defendant. To the extent that a response is required, allegations of wrongdoing and/or causation, whether express or implied, are denied by Answering Defendant.

WHEREFORE, Defendant, Beebe Medical Center, Inc., denies all liability, demands the Complaint of Plaintiff be dismissed with prejudice, and judgment be entered in favor of Answering Defendant and against Plaintiff, together with costs and such other relief as the Court deems appropriate. Answering Defendant demands a jury trial by twelve on all issues.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Answering Defendant is not responsible for persons, events, circumstances or conditions reasonably beyond its control.

THIRD AFFIRMATIVE DEFENSE

Insufficient and/or improper process and/or service of process.

FOURTH AFFIRMATIVE DEFENSE

Failure to mitigate damages.

FIFTH AFFIRMATIVE DEFENSE

Answering Defendant adopts and incorporates here all affirmative defenses asserted by codefendants that are not inconsistent with its position as set forth herein.

SIXTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over the claims asserted.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs failed to file the statutorily required Affidavit of Merit under 18 *Del. C.* § 6853.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint is barred by the applicable Statute of Limitations.

NINTH AFFIRMATIVE DEFENSE

Answering Defendant specifically reserves the right to set forth additional affirmative defenses as revealed by discovery.

WHEREFORE, Answering Defendant, Beebe Medical Center, Inc., denies all liability, demands the Amended Complaint of Plaintiffs be dismissed with prejudice, and judgment be entered in favor of Answering Defendant and against Plaintiff, together with costs and such other relief as the Court deems appropriate. Answering Defendant demands a jury trial by twelve on all issues.

CROSSCLAIMS OF DEFENDANT, BEEBE MEDICAL CENTER, INC.

Answering Defendant, Beebe Medical Center, Inc., hereby crossclaims against codefendants, and, in denying liability to plaintiff, hereby avers that if there is any liability at all, it is the liability of co-defendants, whom are either solely liable to plaintiff, jointly and severally liable, and/or liable to Answering Defendant, for contribution and/or indemnity on the claims set forth by plaintiff in his Complaint. Answering Defendant, Beebe Medical Center, Inc., seeks a determination of *pro rata* legal responsibility pursuant to the provisions of Delaware's Uniform Contribution Among Tortfeasors Law, 10 *Del. C.* § 6301 *et seq.*

DENIAL OF ALL CROSS-CLAIMS

Answering Defendant denies any cross-claims that have been or may be asserted in this matter.

WHEREFORE, Answering Defendant, Beebe Medical Center, Inc., denies all liability, demands that the Complaint of plaintiff be dismissed with prejudice, together with costs and such further relief as the Court deems appropriate, or in the alternative, that Defendant be entitled to contribution and/or indemnification from Codefendants and/or a determination of *pro rata* legal responsibility pursuant to the provisions of Delaware's Uniform Contribution Among Tortfeasors Law, 10 *Del. C.* § 6301 *et seq.* Defendants demand a trial by jury of twelve.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Lorenza A. Wolhar
BRADLEY J. GOEWERT,
ESQUIRE (I.D. #4402)
LORENZA A. WOLHAR,
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P.O. BOX 8888
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Email: lawolhar@mdwcg.com
Attorneys for Defendant,
Beebe Medical Center, Inc.

DATED: January 12, 2023

CERTIFICATE OF SERVICE

I, Lorenza A. Wolhar, hereby certify that on this 12th day of January, 2023, that the Answer of Defendant, Beebe Medical Center, Inc. to Plaintiff's Complaint with Affirmative Defenses and Crossclaims has been served on Pro-Se Plaintiff, via CM/ECF Filing and First-Class mail, postage prepaid, to the following address:

Harold R. Berk
17000 SW Ambrose Way
Port St. Lucie, FL 34986

MARSHALL DENNEHEY
WARNER COLEMAN &
GOGGIN

/s/ Lorenza A. Wolhar
BRADLEY J. GOEWERT,
ESQ. (I.D. #4402)
LORENZA A. WOLHAR.,
ESQ. (I.D. #3971)
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(302) 552-4318
Email: lawolhar@mdwcg.com
Attorneys for Defendant, Beebe Medical Center, Inc.

Dated: January 12, 2023

[FILED: January 19, 2023]

HAROLD R. BERK
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882 mobile
haroldberk@gmail.com

January 18, 2023

VIA FEDERAL EXPRESS

Office of the Clerk
United States District Court
844 North King Street Unit 18
Wilmington, DE 19801-3570

Re: Berk v. Choy, et al., No. 22-1506

Dear friends:

Enclosed are Medical Records being filed under Seal pursuant to Del. Code §6853, which requires they be placed under Seal and not removed or distributed except pursuant to an Order of the Court on the Motion of a Defendant in the above-entitled matter.

I discussed this with several persons in the Clerk's office and we agreed on this procedure as I could not file them under Seal using CM/ECF.

Attached to the Records Under Seal is a Notice of Filing Under Seal which I did file and served on defendants on January 17, 2023 using the CM/ECF System.

Respectfully,
/s/ Harold R Berk
Harold R. Berk
Plaintiff Pro Se

[FILED: January 19, 2023]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-1506-RAG

HAROLD R. BERK,
Plaintiff,

vs.

WILSON C. CHOY, M.D.,BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

NOTICE OF DOCUMENTS FILED UNDER SEAL SATISFYING DEL. CODE §6853

Plaintiff Harold R. Berk, Pro Se, herewith gives notice to all Defendants of the Filing, Under Seal, of the Curriculum Vitae (Resume) of the two Chiefs of the Foot and Ankle Practice of the Rothman Institute, which together with the Medical Reports and Documents, previously filed under Seal on January 18, 2023, constitute compliance with Delaware Code §6853.

/s/ Harold R Berk
Harold R. Berk, Plaintiff, Pro Se
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882
haroldberk@gmail.com

CERTIFICATE OF SERVICE

Plaintiff Harold R. Berk, Pro Se, certifies that he caused a copy of the foregoing Notice of Documents Filed Under Seal Satisfying Del Code §6853 by electronic distribution utilizing the Court's CM/ECF system.

/s/ Harold R. Berk
Harold R. Berk, Plaintiff, Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 1:22-CV-01506-RGA

HAROLD R. BERK,

Plaintiff,

v.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants.

TRIAL BY JURY OF 12 DEMANDED

MOTION OF DEFENDANT, BEEBE MEDICAL CENTER, INC., TO DETERMINE IF THE AFFIDAVIT OF MERIT COMPLIES WITH SECTIONS (a)(1) AND (c) OF 18 *Del. C.* §§ 6853 AND 6854

Defendant, Beebe Medical Center, Inc., (hereinafter "Beebe Medical Center, Inc." or "Moving Defendant") requests that the Court review the affidavit of merit(s) and the *curriculum vitae* that has been filed with the Complaint in order to determine whether it complies with 18 *Del. C.* § 6853 (a)(1) and (c), and 18 *Del. C.* § 6854, as to Defendant, Beebe Medical Center, Inc., and in support of this Motion, avers as follows:

1. The instant action arises from alleged healthcare medical negligence by Beebe Medical Center, Inc. and

others.[1] The Complaint was filed on 11/18/2022, and alleges, *inter alia*, that Moving Defendant's Emergency Room "physicians, nurses, physicians' assistants and employees owed plaintiff a duty to diagnose and treat plaintiff according to the appropriate medical standard of care" and that "causing additional injury and not doing a post injury Xray was not in accordance with the standard of care of a medical hospital licensed in Delaware." D.I. 1, at ¶¶ 54, 61.

2. Because Beebe Medical Center, Inc. is a healthcare provider within the meaning of 18 *Del. C.* § 6801, and this is a healthcare negligence lawsuit[2], an Affidavit of Merit signed by an expert witness accompanied by a current *curriculum vitae* are required by 18 *Del. C.* § 6853 (a)(1).

3. Concurrently with the filing of Plaintiff's Complaint, Plaintiff filed a request to this Court for the one-time, sixty-day extension to file an Affidavit of Merit allowable pursuant to the plain language of 18 *Del. C.* § 6853 (a)(2). D.I. 6. The Court granted the request, and Plaintiff was to file a conforming Affidavit of Merit on or before January 23, 2023. D.I. 9.

4. On 1/17/2023, Plaintiff filed a "Notice of Filing Medical Records Under Seal Satisfying Del. Code § 6853." D.I. 21. On 1/19/2023, Plaintiff filed a "Notice of Documents Filed Under Seal Satisfying Del. Code § 6853." D.I. 25. On 1/20/2023, Plaintiff filed Curriculum Vitas related to these two previous filings. D.I. 26.

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[1] Plaintiff's Complaint at D.I. 1.

[2] Notably, Plaintiff seeks to avail himself of the 90-day extension of the two-year statute of limitations available solely to Delaware actions founded in medical negligence. D.I. 1, at ¶ 6.

5. The extension of time granted by the Court to file an Affidavit of Merit is now expired, and Moving Defendant has no basis to know whether Plaintiff's Affidavit of Merit complies with the above statute, or if an Affidavit of Merit was even filed in this matter as documents were filed under seal.[3]

6. 18 *Del. C.* § 6853 requires certification against *each* Defendant that i) there are reasonable grounds to believe that the standard of care was breached by the named defendant and that the breach was a proximate cause of injury or injuries claimed in the complaint; ii) that the expert is licensed to practice medicine as of the date of the affidavit; iii) in the three years immediately preceding the alleged negligent act, the expert has been engaged in the treatment of patients and/or in the teachings/academic side of medicine in the same or similar field of medicine as the Defendant; and iv) the expert shall be Board certified in the same or similar field of medicine of the named defendant.[4] If the Affidavit of Merit does

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[3] As set forth by the Delaware Supreme Court in *Dishmon v. Fucci*, 32 A.3d 338, 344-45 (Del. 2011), "[f]rom the plain language of Section 6853, it is clear that where a party fails to file an Affidavit of Merit with the Superior Court, the Court will not entertain the case."

[4] *See* 18 *Del. C.* § 6853 (c). 18 *Del. C.* § 6853 (c) states: (c) Qualifications of expert and contents of affidavit. -- The affidavit(s) of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant(s) and that the breach was a proximate cause of injury(ies) claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant(s), and the expert shall be Board

not meet each criterion, then it is insufficient as a matter of law.

7. As Delaware courts have instructed, an Affidavit of Merit that simply refers to "Defendants" collectively "fails to meet the standard requiring an affidavit 'as to' each defendant."[5] Furthermore, when the basis of the claim against the defendant is solely vicarious liability for the conduct of an agent, an adequate affidavit of merit as to the agent's negligence is required to sustain a claim at the outset against the principal, while claims of independent medical negligence require their own statutorily sufficient Affidavit of Merit.[6]

8. Subsection (d) of § 6853 states that upon Motion the Affidavit of Merit shall be reviewed *in camera* to determine whether it complies with paragraphs (a)(1) and (c).

9. A Plaintiff's *pro se* status also does not exempt him from the requirements of 18 *Del. C.* § 6853. Delaware courts consistently hold a party's *pro se* status does not excuse failures to comply with statutory requirements.[7] Moreover, the Delaware Supreme Court

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certified in the same or similar field of medicine if the defendant(s) is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

[5] *Woerner v. Christiana Care Health Services, Inc.,* 2020 WL 4596791 (Del. Super. Ct. August 10, 2020)(citing 18 *Del. C.* § 6853 (a)(1)).

[6] *Willis v Bayhealth Surgical Associates,* 2018 WL 3343240, (Del. Super. Ct. July 9, 2018); *Buck v. Nanticoke Mem. Hosp.,* 2015 WL 2400537 (Del. Super. Ct. May 19, 2015).

[7] *De Roche v. Grewal*, 2016 WL 5793721 (Del. Super. Ct. 2012)(citation omitted).

has determined that it is a *pro se* litigant's "responsibility to file an affidavit of merit when asserting his medical negligence claim".[8]

10. Therefore, Moving Defendant respectfully requests that the Court review the Affidavit of Merit *in camera* to determine that it complies with the statute, specifically:

a) the affidavit of merit is signed by an expert witness;

b) the affidavit of merit is accompanied by a curriculum vitae for the expert;

c) the affidavit gives an opinion that there are reasonable grounds to believe that there has a been a breach in the standard of care by the Defendant, Beebe Medical Center, Inc., that is the proximate cause(s) of the injuries alleged in the Complaint;

d) the curriculum vitae attached to the affidavit of merit establishes that the expert was licensed to practice medicine as of the date of the affidavit;

e) the curriculum vitae establishes that the expert, for the three years immediately preceding the alleged negligent act, has been engaged in the treatment of patients and/or in the teaching/academic side of the same or similar type of medicine as Defendant.

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[8] *Enhaili v. Patterson*, 197 A.3d 491 (ORDER), 2018 WL 5877282 (Del. 2018)(citing *Smith v. Kobasa*, 113 A.3d 1081 (ORDER), 2015 WL 1903546, (Del. 2015); *Smith v. Correct Care Solutions, LLC*, 49 A.3d 1194 (Order), 2012 WL 3252864 (Del. 2012) (holding dismissal is an appropriate remedy when a *pro se* litigant fails to file an Affidavit of Merit with a Complaint founded in medical negligence.))

WHEREFORE, Defendant, Beebe Medical Center, Inc., requests that the Affidavit of Merit be reviewed *in camera* to determine whether the submissions comply with 18 *Del. C.* § 6853 (a)(1), and (c), pursuant to 18 *Del. C.* § 6853 (d) as to Defendant, Beebe Medical Center, Inc.

MARSHALL DENNEHEY
WARNER COLEMAN &
GOGGIN

/s/ Lorenza A. Wolhar
BRADLEY J. GOEWERT,
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8888
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Email: lawolhar@mdwcg.com

Attorneys for Defendant,
Beebe Medical Center, Inc.

DATED: January 24, 2023

CERTIFICATE OF SERVICE

I, Lorenza A. Wolhar, hereby certify that on this 24th day of January, 2023, that the Motion of Defendant, Beebe Medical Center, Inc., to Determine if the Affidavit of Merit Complies with Sections (A)(1) and (C) of 18 *Del. C.* §§ 6853 and 6854 has been served on *Pro se* Plaintiff, Harold R. Berk, via CM/ECF Filing.

MARSHALL DENNEHEY
WARNER COLEMAN &
GOGGIN

/s/ Lorenza A. Wolhar
BRADLEY J. GOEWERT,
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LORENZA A. WOLHAR,
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Attorneys for Defendant,
Beebe Medical Center, Inc.

Dated: January 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 1:22-cv-1506 RGA

HAROLD R. BERK

Plaintiff,

v.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL MIDDLETOWN, LLC,

Defendants.

TRIAL BY JURY DEMANDED

MOTION OF DEFENDANT WILSON C. CHOY, M.D. TO DETERMINE IF THE AFFIDAVIT OF MERIT COMPLIES WITH SECTIONS (a)(1) AND (c) OF TITLE 18 §6853

Defendant Dr. Wilson C. Choy (hereinafter "Defendant") respectfully submits this request that the Court review the Affidavit of Merit and the *curriculum vitae* that has been filed with the Complaint in order to determine whether it complies with Title 18 §6853(a)(1) and (c), and 18 Del. C. § 6854. This motion and request to determine if the Affidavit of Merit complies with the statute is based upon the following:

1. The instant action arises from the alleged medical negligence by Defendants, including Dr. Choy. The

Complaint was filed on or about November 18, 2022. D.I. 1.

2. Concurrently with the filing of the Complaint, Plaintiff filed a request for the one time sixty (60) day extension to file an Affidavit of Merit. D.I. 6. The Court granted the request and Plaintiff was to file a conforming Affidavit of Merit on or before January 23, 2023. D.I. 9.

3. The 60 day extension of time granted by the Court has passed and Moving Defendant has no basis to determine whether Plaintiff's Affidavit of Merit complies with the above statute, or even if an Affidavit of Merit was filed in this matter since the documents were filed under seal.[1]

4. The Affidavit and the accompanying *curriculum vitae* are required by the above statute.

5. Defendant has no basis to know whether the *curriculum vitae* establishes that the expert "is licensed to practice medicine as of the date of the affidavit" or whether "in the three years immediately preceding the alleged negligent act [he or she] has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant" or whether "the expert shall be Board Certified in the same or similar field of medicine"

6. Subsection (a)(1) states that if the required affidavit is not filed, the suit shall not be accepted by the Prothonotary.

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[1] D.I. 21
D.I. 25
D.I. 29

7. Subsection (d) states that the Affidavit of Merit shall be reviewed in camera to determine whether the Affidavit of Merit complies with paragraphs (a)(1) and (c).

WHEREFORE, Defendant Wilson C. Choy, M.D., respectfully requests that the Court review the Affidavit of Merit in camera to determine that it complies with the statute, specifically:

a. That it is signed by an expert witness.

b. That it is accompanied by a *curriculum vitae.*

c. That the Affidavit of Merit states all its opinions to a reasonable degree of medical probability.

d. That it gives an opinion that there has been healthcare medical negligence by EACH defendant.

e. That the expert gives an opinion that each breach by EACH defendant was a proximate cause of injuries alleged in the Complaint.

f. That each *curriculum vitae* establishes that the expert shall be licensed to practice medicine as of the date of the Affidavit as to EACH Defendant that the expert opines is negligent.

g. That as of the date of the Affidavit(s) as to Defendant Wilson C. Choy, M.D., particularly, that the curriculum vitae establishes that the expert(s), for the three years preceding the negligent act, have been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the Dr. Choy which the expert(s) opines negligent.

h. That the expert(s) against the Defendant is / are Board Certified in the same field of medicine as Dr. Choy who the expert(s) opines is negligent.

ELZUFON AUSTIN & MONDELL, P.A.

/s/ Matthew P. Donelson
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P.O. Box 1630
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(302) 504-3231
mdonelson@elzufon.com
Attorneys for Defendant
Wilson C. Choy, M.D.

Date: January 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Case No. 1:22-cv-01506 RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

TRIAL BY JURY OF TWELVE DEMANDED

MOTION OF DEFENDANT ENCOMPASS HEALH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC TO DETERMINE IF THE AFFIDAVIT OF MERIT COMPLIES WITH SECTIONS (a)(1) AND (c) OF TITLE 18 § 6853

Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC ("Defendant") respectfully requests that the Court review the Affidavit(s) of Merit and the *curriculum vitae* that have been filed by Plaintiff in order to determine whether the Affidavit(s) comply with Title 18 § 6853(a)(1) and (c). This Motion is based upon the following:

1. The Affidavit(s) and the accompanying *curriculum vitae* are required by the above statute.

2. Defendant has no basis to know whether or not the Affidavit(s) comply with the above statute.

3. Defendant has no basis to know whether the *curriculum vitae* establishes that the expert(s) "is licensed to practice medicine as of the date of the affidavit" or whether "in the three years immediately preceding the alleged negligent act she has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant" or whether "the expert shall be Board Certified in the same or similar field of medicine".

4. Subsection (a)(1) states that if the required Affidavit(s) are not filed, the suit shall not be accepted by the Prothonotary.

5. Subsection (d) states that the Affidavit(s) of Merit shall be reviewed in camera to determine whether the Affidavit(s) of Merit comply with paragraphs (a)(1) and (c).

WHEREFORE, Defendant respectfully requests that the Court review the Affidavit(s) of Merit in camera to determine that it/they complies with the statute, specifically:

1. That they are signed by an expert witness.

2. That it/they are accompanied by a *curriculum vitae*.

3. That the Affidavit(s) of Merit state all of its opinions with reasonable medical probability.

4. That they give an opinion that there has been healthcare medical negligence against each defendant, specifically including agents, servants and employees of Encompass Health Rehabilitation Hospital of Middletown, LLC.

5. That the expert(s) give an opinion that each breach against each defendant was a proximate cause of injuries alleged in the Complaint.

6. As of the date of the Affidavit(s) as to Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC, particularly, that the expert(s) is/are board certified and that the *curriculum vitae* establishes that the expert(s), for the three years preceding the negligent act, have been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the purported agents or employees that expert(s) opines is negligent (skilled nursing, physical and occupational therapy).

ECKERT SEAMANS CHERIN & MELLOTT, LLC

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Dated: January 24, 2023

[FILED: January 29, 2023]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-cv-1506-RGA

HAROLD R. BERK

Plaintiff,

v.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL MIDDLETOWN, LLC,

Defendants.

JURY TRIAL DEMANDED

PLAINTIFF BERK'S MEMORANDUM OF LAW IN OPPOSITION TO EACH DEFENDANTS' MOTION TO PERMIT *IN CAMERA* REVIEW OF AFFIDAVIT OF MERIT AND SUPPORTING DOCUMENTS

Plaintiff Harold R. Berk, Pro Se, filed this action on November 18, 2022 alleging medical malpractice and facility medical malpractice against defendants Wilson C. Choy, MD ("Choy"); Beebe Medical Center, Inc. ("Beebe") and Encompass Rehabilitation Hospital of Middletown, LLC ("Encompass") regarding events occurring from August 20, 2020 to the present. Included in the Complaint were factual allegations concerning assault and battery performed by employees of both Beebe and Encompass and claims

of lack of supervision of employees of Beebe which are being detailed in a Motion for Leave to Amend the Complaint which is being filed shortly. This action was filed under the Court's diversity jurisdiction, under 28 U.S.C. §1332, by Plaintiff, a citizen and resident of Florida against the defendants all of whom are citizens of or are incorporated in Delaware.

Following the procedure in Delaware on medical malpractice cases, Plaintiff filed the Affidavit of Merit, required by Del Code §6853, under Seal on January 19, 2023 (Docket 23), with Notice to Defendants of filing under Seal filed on January 18, 2023 (Docket 21). Plaintiff then filed the Curriculum Vitae of the medical physicians who prepared Docket 23, also under seal pursuant to Delaware law (Docket 26), and gave notice to Defendants of filing the Curriculum Vitae under Seal (Docket 25). In the interest of eliminating any question of the qualifications of the medical experts, I will disclose that the Curriculum Vitae filed are of Steven M. Raikin, M.D., the now medically retired former head of the Foot and Ankle practice of the Rothman Institute and his successor, David I. Pedowitz, M.D., the current head of the Foot and Ankle practice of the Rothman Institute, both of whom examined and treated me and in Dr. Rainkin's case, performed the surgery that defendant Choy refused to perform. Dr. Raikin had severe medical problems occurring in 2022 and had a lung transplant surgery at the Hospital of the University of Pennsylvania, and I talked with Dr. Raikin on January 26, 2023 on his mobile phone to see how he was progressing, and we exchanged our recent medical histories. Needless to say Dr. Raikin is upset about having to leave his medical practice at the height of his career, and as he said dejectedly to me, "I am not even a doctor anymore."

Each defendant filed on January 24, 2023 a Motion for *In Camera* Review of the Affidavit of Merit and the Curriculum Vitae. (Dockets 32, 33, and 34).

Plaintiff contends in this Memorandum, that *In Camera* inspection of the Affidavit of Merit is not required because Del. Code §6853, or similar provisions in other states, conflicts with Rules 3, 8, 9, 11 and 12(b)(6) of the FRCP as has recently been held concerning Certificate or Affidavit of Merit provisions in other states by the Second, Fourth, Sixth, Seventh and Ninth Circuits. The Third Circuit has never reviewed the applicability of Del Code §6853 in a diversity action, and Plaintiff submits that if the Third Circuit would do so, it would follow the recent holdings by the Second, Fourth, Sixth, Seventh and Ninth Circuits. Plaintiff also contends that if the Court rejects that argument based on the weight of numerous recent Circuit decisions, an *in camera* inspection would convince the Court that Del Code §6853 has been satisfied as to each defendant.

<u>In a Diversity Action, Del Code §6853 Does Not Apply As it Conflicts With Rules 3, 8, 9, 11 and 12(b)(6) of the FRCP</u>

The Third Circuit has ruled a number of times on the effect and applicability of the of the Pennsylvania and New Jersey Certificate of Merit requirements, each of which is a little different. One of the leading cases in the Third Circuit is *Lincoln- Redding v. Estate of Sugarman,* 659 F.3d 258 (3d Cir. 2011) which held that Pennsylvania Rule 1042.3, requiring the filing of a Certificate of Merit ("COM") in malpractice cases, was binding in a diversity action in Pennsylvania for legal malpractice. In New Jersey, the Third Circuit held in *Nuveen Mun. Trust ex rel. Nuveen High Yield Municipal Bond Fund v.*

Withumsmith Brown, P.C., 692 F.2d 283 (3rd Cir. 2012), that the New Jersey Affidavit of Merit ("AOM") requirement, applicable to all professional malpractice claims, applied to a malpractice action against accountants in a diversity action. Both cases raise the question under *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) and *Hanna v. Plumer,* 380 U.S. 460 (1965) whether the AOM or COM are procedural pleading requirements or substantive law that must be applied in a federal court diversity action. But the Third Circuit in *Nuveen* also explored the issue whether the decisions in *Bell Atlantic Corp. v/ Twombly,* 550 U.S. 544 (2007), *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), and *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co,*, 559 U.S. 393 (2010) effectively overruled *Erie* and *Hanna* making the AOM in conflict with Rule 8 of the FRCP.

The Third Circuit said in *Nuveen* that the AOM is not a pleading as it is filed after the pleadings have been filed and hence there was no conflict with Rules 8 or 9 of FRCP. *Id.* at 303. The Third Circuit held that because the AOM was not part of the pleadings, it was not in conflict with the pleading Rules of FRCP and was a substantive law and not a procedural one that did not conflict with any federal requirement. *Id.* at 304.

The Third Circuit has not considered or ruled upon the applicability of Del Code §6853 in a diversity action. Since the rulings on COM and AOM examine the specifics of the requirements, timing and other factors affecting the COM and AOM, the prior Third Circuit cases are not precedential in determining if §6853 must be applied or not in a federal diversity case in Delaware.

There is only one federal case in Delaware discussing the Affidavit of Merit of §6853 in a pro se case brought by a plaintiff alleging improper medical treatment in the Delaware Psychiatric Center, and as this Honorable Court knows well there were significant statute of limitations problems in that case, and the pro se plaintiff did not file an Affidavit of Merit. Judge Andrews did order that plaintiff would be granted leave to file an Amended Complaint including an Affidavit of Merit complying with §6853. *Jones v. Mirza,* No. 15-1017-RGA (D. Del. 2016).

Contrary to those 10 and 11 year old rulings by the Third Circuit, every Circuit Court of Appeals that has recently examined the question of whether a COM or AOM or other document required by a state statute or rule has held that the state COM or AOM is not required in a federal diversity action due to conflict of those state procedures with the pleading rules of the FRCP. The Circuits are now so strongly in favor of not burdening federal diversity litigation on medical malpractice claims, that I feel the Third Circuit would respond to the weight of Circuit authority and hold that Del Code §6853 is a procedural rule and not substantive law, and that it would conflict with Rules 3, 8, 9 and 11 of the FRCP and will not be enforced in a federal diversity action in Delaware.

In *Corley v. United States*, 11 F.4th 79 (2nd Cir. 2021) a former federal prisoner brought a Federal Tort Claims Act case against the U.S. based on medical malpractice in a federal correctional facility in Connecticut. A Connecticut statute §52-190a required filing a certificate with a complaint that an attorney or plaintiff made a good faith determination that medical negligence had occurred, and if the certificate is not attached to the Complaint, service is

deemed insufficient. The U.S. objected to service as there was no certificate attached to the Complaint, but the Second Circuit ruled that §52-190a was only procedural and would not be binding in a federal diversity action and that it conflicted with the service of process rules in Rule 4 FRCP.

The Fourth Circuit in *Pledger v. Lynch,* 5 F.4th 511 (4th Cir. 2021), held that a West Virginia statute, W VA Code §55-7B-6, required a plaintiff in a medical malpractice action to obtain a certificate from a medical expert before filing suit, but that was held to be inconsistent with the FRCP and the medical expert certificate is held to be inapplicable in litigation in federal court. The Fourth Circuit did a careful analysis of the conflict between the W.Va COM and various of the Federal Rules:

> But there is now a growing consensus that certificate requirements like West Virginia's do not govern actions in federal court, because they conflict with and are thus supplanted by the Federal Rules of Civil Procedure. *See Gallivan v. United States* , 943 F.3d 291, 294 (6th Cir. 2019); *Young v. United States* , 942 F.3d 349, 351 (7th Cir. 2019). We agree, and hold that failure to comply with West Virginia's MPLA is not grounds for dismissal of Pledger's federal-court FTCA action.

The Fourth Circuit opinion then notes how the analysis avoids the procedural-substantive dichotomy of *Erie v. Tompkins:*

> But if there is a valid Federal Rule that answers the "same question" as the MPLA, then our work is done, and we apply the

> Federal Rules without wading into the "murky waters" of *Erie Railroad Co. v. Tompkins* , 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its distinct choice-of-law rules. *Shady Grove* , 559 U.S. at 398–99, 130 S.Ct. 1431. *Id.* at 519.

The Court then does an analysis of the conflict of the W.VA. COM and the specific Federal Rules:

> We begin with the pleading standards for complaints in federal court. Rule 8 of the Federal Rules of Civil Procedure requires only a "short and plain statement" of a plaintiff's claim, in a deliberate departure from the more detailed pleading requirements of the past. Fed. R. Civ. P. 8(a)(2) ; *see Shields* , 436 F. Supp. 3d at 548. With that description of his claim, a plaintiff also must provide a jurisdictional statement and an explanation of the relief sought, *see* Fed. R. Civ. P. 8(a)(1), (3) – a list of elements that "implicitly excludes other requirements." *Gallivan*, 943 F.3d at 293 (internal quotation marks omitted). The MPLA, by contrast, requires more: that a plaintiff not only provide a "short and plain statement" of his claim in order to file suit, but also serve a certificate attesting to the merit of that claim – or, if he believes his claim falls into a limited statutory exception to the certificate requirement, serve and file "a statement specifically setting forth the basis of the alleged liability of the health care provider." W. Va. Code § 55-7B-6(c) (2003); *see State ex rel. Hope Clinic, PLLC v. McGraw* , 858 S.E.2d 221, 228 (W. Va. 2021). *Id* at 519.

Then the Fourth Circuit compares the W.Va. COM with Rule 9:

> Rule 9 only "confirms" this contrast between the MPLA and the Federal Rules' baseline pleading standard "by specifying the few situations when heightened pleading *is* required" in federal court. *Gallivan,* 943 F.3d at 293. Under Rule 9, only those alleging fraud or mistake must "state with particularity the circumstances" giving rise to their claims. Fed. R. Civ. P. 9(b). The MPLA governs claims that do not relate to fraud or mistake, yet still "impose[s] a heightened pleading standard." *Gallivan*, 943 F.3d at 293. Applying it in federal court, then, "would upset the careful balance struck by the Federal Rules." *Id.* at 293–94. *Id.* at 519-520

The Fourth Circuit continues its rule by rule analysis with Rule 12 of the FRCP:

> Rule 12 is likewise "sufficiently broad" to control a question that the MPLA, too, seeks to answer: what defects in a complaint mandate dismissal. *See Burlington N. R.R. Co.*, 480 U.S. at 4–5, 107 S.Ct. 967 (internal quotation marks omitted). Under Rule 12, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

> Plaintiffs need not gather any expert evidence or serve it on defendants "for a claim to be plausible." *Gallivan*, 943 F.3d at 293. The MPLA's certificate requirement thus represents an additional hurdle for plaintiffs. In fact, in West Virginia state court, failure to comply with the MPLA's pre-suit procedures – in whole or in part – is grounds for dismissal under the state's equivalent of Rule 12. *See Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387, 395 (2005). *Id* at 520.

Finally, the Fourth Circuit compares the W.Va. COM to Rule 11:

> Finally, we agree with Pledger that West Virginia's MPLA is inconsistent with Rule 11, which addresses frivolous filings. See Fed. R. Civ. P. 11(a)–(d). As the United States itself acknowledges, the MPLA's certificate requirement addresses the same issue, and likewise seeks to limit frivolous malpractice suits. But it does so through a mechanism – an early affidavit from an expert – that Rule 11 specifically disclaims: Rule 11 expressly provides that "a pleading need not be verified or accompanied by an affidavit," and instead treats the signature of an attorney or party as a certification that the claim is legally sufficient and likely factually supported. Fed. R. Civ. P. 11(a), (b) (emphasis added).
>
> In short, like courts before us, we find that it is "impossible to reconcile" certificate requirements like West Virginia's with the "requirements of the Federal Rules of Civil

> Procedure." *Shields*, 436 F. Supp. 3d at 548. And contrary to the suggestion of the United States, it is no answer that it would be possible for a claimant to "comply with both" the Federal Rules and West Virginia law, satisfying the more generous standards of the Federal Rules and then adding something extra for the MPLA. Under *Shady Grove*, what matters is whether the "one-size-fits-all formula" for filing and maintaining a complaint set out by the Federal Rules is enough to "provide[ ] an answer" to the question at issue: whether a plaintiff must obtain an expert certificate of merit before he may file and maintain a medical malpractice suit. *See* 559 U.S. at 398– 99, 130 S.Ct. 1431. Because the Federal Rules answer that question in the negative, West Virginia's MPLA cannot apply to Pledger's federal-court action under step one of the *Shady Grove* framework. *Id.*

The Sixth Circuit has also followed this growing line of decisions in *Albright v. Christensen,* 24 F.4th 1039 (6th Cir. 2022). The Sixth Circuit in a medical malpractice diversity case reviewed the Michigan affidavit-of-merit and pre-suit notice rules. The Court said:

> We must confront two well-known cases—*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)—to resolve this classic civil procedure conundrum. We agree with Defendants that *Albright* has asserted a medical-malpractice claim. *Hanna* however,

> requires us to hold that the Federal Rules of Civil Procedure conflict with Michigan's affidavit-of-merit and presuit-notice requirements. These state rules therefore do not apply in diversity cases in federal court. Because the district court mistakenly invoked *Erie* and applied the presuit-notice rule in *Albright*'s case, we REVERSE and REMAND *Id.* at 1042.

The Sixth Circuit began its analysis with the same framework as the other recent Circuit Court cases:

> If a state law collides with a federal rule, we must determine whether the federal rule applies under the Rules Enabling Act (REA) and relevant constitutional standards per Justice Stevens's controlling concurrence in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 421–25, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (Stevens, J., controlling opinion). *See Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1091 & n.2 (6th Cir. 2016).[1] The relevant question is whether the federal rule is a "general rule[] of practice and procedure" that does "not abridge, enlarge or modify any substantive right" and is "procedural in the ordinary use of the term." *Shady Grove* , 559 U.S. at 418, 423, 130 S.Ct. 1431 (Stevens, J., controlling opinion) (citation omitted). *Id.*at 1044-1045.

The Sixth Circuit then embarked on a comprehensive review of the various Rules of the FRCP:

> Relevant to this case are Federal Rules of Civil Procedure 3, 8(a), 9, 11, and 12(b)(6).

Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3. Rule 8(a) requires pleadings to contain "a short and plain statement of the claim." FED. R. CIV. P. 8(a)(2). Rule 9 specifies when heightened pleadings are required. *See* FED. R. CIV. P. 9. Rule 11 wards against frivolous claims and defenses. *See* FED. R. CIV. P. 11; *see id.* advisory committee's note to 1993 amendment ("[Rule 11(b)(2)] establishes an objective standard, intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments."). Rule 11 states that "Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit" and that an attorney's signature on, submission of, or advocacy regarding a filing certifies that the argument is nonfrivolous. *Id.* 11(a), (b).3 And Rule 12(b)(6) guarantees that a complaint that alleges sufficient facts will survive a motion to dismiss. See FED. R. CIV. P. 12(b)(6).

FN 2 "We acknowledge that Rule 11 states a pleading need not contain a verification '[u]nless a rule or statute specifically states otherwise.' The rule's reference to other rules or statutes, however, means other federal rules or statutes." *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014) (alteration in original, emphasis added, citation omitted).

FN3 We note that *Albright* did not argue that Rule 11 conflicts with Michigan's rules. *See* Appellant's Br. at 14–15. But it would be

disingenuous for us to ignore a rule that so obviously conflicts with the affidavit-of-merit requirement. *See* Fed. R. Civ. P. 11(a) ("[A] pleading need not be verified or accompanied by an affidavit."). We are, moreover, persuaded by the Fourth Circuit's recent decision that Rule 11 conflicts with West Virginia's presuit requirements, which, as explained below, combines Michigan's presuit-notice and affidavit-of-merit rules. *See Pledger v. Lynch*, 5 F.4th 511, 520 (4th Cir. 2021).

We agree with the district court's finding that Michigan's affidavit-of-merit requirement conflicts with the Federal Rules of Civil Procedure. The question in dispute is whether a plaintiff must provide an affidavit of merit in order to state a claim of medical malpractice. *See Gallivan*, 943 F.3d at 293. Directly relevant here is our recent decision Gallivan, in which we tackled an almost-identical Ohio affidavit-of-merit requirement. *See id*. In *Gallivan*, we explained that Rules 8(a), 9, and 12(b)(6) do not require that plaintiffs file affidavits with their complaints in order to state a claim and held that these Federal Rules exclude other requirements that must be satisfied for a complaint to state a claim. *See id.* at 293–94. We thus concluded in *Gallivan* that that Rules 8(a), 9, and 12(b)(6) answer this question in dispute. *See id.* at 294. We reach the same conclusion in the present case. Our decision is bolstered by Rule 11, which states outright that "a pleading need not be verified or accompanied by an affidavit." FED. R.

> CIV. P. 11(a). Because § 600.2912d collides with Rules 8(a), 9, 11, and 12(b)(6), we hold that Michigan's affidavit-of-merit requirement does not apply in federal court. *Id.* at 1045-1046.

The Sixth Circuit then compares Rule 3 of the FRCP and the Michigan affidavit-of-merit and pre-suit filing notice:

> Of the relevant Federal Rules, Rule 3 most obviously resolves this disputed question. That rule requires only the filing of a complaint to commence an action—nothing more. *Compare* FED. R. CIV. P. 3 ("A civil action *is commenced* by filing a complaint with the court" (emphasis added)) and *id.* advisory committee's note to 1937 adoption ("[Rule 3] provides that the *first step in an action* is the filing of the complaint." (emphasis added)), *with* MICH. COMP. LAWS § 600.2912b ("[A] person *shall not commence an action* alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." (emphasis added)) *Id.* at 1046.

The Sixth Circuit then compares the FRCP applicable pleading rules with the Michigan pleading requirements and agrees with the Fourth Circuit decision in *Pledger*:

> Federal Rules 8(a), 9, 11, and 12 are on point, too. In its interpretation of § 600.2912b, the Michigan Supreme Court explained: "the

> failure to comply with the [presuit-notice] requirement renders the complaint insufficient to commence the action." *Burton v. Reed City Hosp. Corp.*, 471 Mich. 745, 691 N.W.2d 424, 429 (2005) (emphasis added). The state high court clearly applies § 600.2912b(1) as a pleading requirement. Because Michigan applies the pre-suit notice statute, the Michigan statute adds steps to the process of commencing an action. Because both Section 600.2912b and Rule 3 govern how a lawsuit is commenced, the two clearly conflict. *See Walker*, 446 U.S. at 750 n.9, 100 S.Ct. 1978

The Sixth Circuit also examined the pre-suit notice requirements in the Michigan statute and concluded they were inconsistent with the FRCP:

> The same reasoning applies to the pre-suit notice requirement. Section 600.2912b(4) requires that the notice include:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.
>
> MICH. COMP. LAWS § 600.2912b(4). These requirements exceed those in Federal Rule 8(a), which requires only "a short and plain statement of the grounds for the court's jurisdiction"; "a short and plain statement of the claim showing that the pleader is entitled to relief"; and "a demand for the relief sought." If Michigan law provided that its requirements be included in the complaint, rather than in the notice, that law would clearly not apply federal court. The Fourth Circuit held in *Pledger* that serving an affidavit of merit before a complaint conflicted with federal pleading requirements. In this instance, too, the state cannot circumvent federal pleading requirements by requiring plaintiffs to serve documents before filing the complaint. Otherwise, the state could create any pleading requirement it chose and label it a notice requirement, and it would apply in federal court. Such a result is inconsistent with both *Hanna* and the Federal Rules of Civil Procedure.

The Sixth Circuit concluded its analysis with the following holding and conclusion:

> CONCLUSION
>
> Because Michigan's affidavit-of-merit and presuit- notice requirements do not apply in diversity actions, *Albright* did not need to comply with them when she brought her

> medical-malpractice action. We thus REVERSE and REMAND. *Id.* at 1049.

See also *Gallivan v. United States,* 943 F.3d 291 (6th Cir. 2019), where the Sixth Circuit also held the Ohio affidavit of merit requirement for medical malpractice actions did not apply in a federal diversity action due to conflict between the Ohio requirements sand various pleading and other rules of the FRCP.

The Ninth Circuit is in agreement with this line of Circuit Court decisions. In *Martin v. Pierce County,* 34 F.4th 1125 (9th Cir. 2022), the Ninth Circuit followed the line of analysis of the other Circuits but with a different state provision which required as a pre-condition of filing a medical malpractice claim the plaintiff had to agree not to seek arbitration of the claims:

> This case involves a single issue: does a Washington state law requiring a claimant to file a declaration declining to submit the case to arbitration when filing a medical malpractice suit apply in federal court? We conclude that it does not. Washington's declaration requirement conflicts with the Federal Rules of Civil Procedure. Thus, under *Hanna v. Plumer*, 380 U.S. 460, 470–74, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the state rule does not apply in federal court. Because the district court mistakenly applied the state rule in Martin's case, we REVERSE and REMAND. *Id.* at 1126-1127.

The Washington conditions for filing a medical malpractice suit are somewhat different from those in other states:

> Washington requires a plaintiff in a medical-malpractice suit to elect or decline to submit a claim to arbitration at the time suit is commenced. RCW 7.70A.020. If the plaintiff does not elect to submit the dispute to arbitration, the plaintiff must meet the following requirements:
>
> a) in the case of a claimant, the declaration must be filed at the time of commencing the action and must state that the attorney representing the claimant presented the claimant with a copy of the provisions of this chapter before commencing the action and that the claimant elected not to submit the dispute to arbitration under this chapter[.]

The Ninth Circuit reviewed other cases involving certificates of merit and their conflict with the FRCP, such as *Corley*, *Pledger*, *Albright and Halligan* and concluded:

> But there is a "growing consensus" among federal circuit courts that such certificate requirements do not govern actions in federal court, because they conflict with and are thus supplanted by the Federal Rules of Civil Procedure. *Pledger v. Lynch*, 5 F.4th 511, 518 (4th Cir. 2021) (holding that West Virginia's pre-suit certification requirement did not govern actions in federal court because it conflicted with and was thus supplanted by Rules 8, 9, 11, and 12) (citing *Gallivan v. United States*, 943 F.3d 291, 294 (6th Cir. 2019) (holding that Ohio's certificate-of-merit requirement was incompatible with Rules 8, 9, and 12 the Federal Rules of Civil Procedure and thus unenforceable in federal

> court)); *Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019) (holding that a complaint could not be dismissed because it lacked an affidavit and report as required by Illinois law, because to the extent that it was a rule of procedure, it gave way to Rule 8 of the Federal Rules of Civil Procedure); *see also Corley*, 11 F.4th at 88–89 (holding that Connecticut's certificate of merit requirement did not apply in federal court because it was in "direct contrast" to the notice pleading standard of Rule 8); *Albright v. Christensen*, 24 F.4th 1039, 1048–49 (6th Cir. 2022) (holding that Michigan's affidavit-of-merit and presuit-notice requirements do not apply in federal court as they were displaced by Rules 3, 8(a), 9, 11, and 12(b)(6) of the Federal Rules of Civil Procedure). While courts identified conflicts with various Federal Rules, in each case they describe conflict with Rule 8. *Id.* at 1129-1130.

The Ninth Circuit held that Rule 8 of the FRCP precludes any obligation to file any type of affidavit with a complaint for medical malpractice:

> We agree. Rule 8's requirement of a "short and plain statement" of the plaintiff's claim, jurisdictional statement, and explanation of the relief sought is "a list of elements that 'implicitly excludes other requirements.'" *Pledger*, 5 F.4th at 519. As such, "Rule 8 does not require litigants to file *any* affidavits." *Gallivan*, 943 F.3d at 293 (emphasis in original).

The Ninth Circuit held that the Washington requirement of filing a Declaration with the complaint that

the Plaintiff will not seek arbitration of medical malpractice claims violates Rule 3 of the FRCP.

> The Washington law not only requires a claimant to file a declaration when commencing an action, but it also adds a step before commencement—an attorney must present the claimant with a copy of the provisions in the chapter. This directly collides with Rule 3's requirement that an action *commences* with the filing of the complaint. *See* Fed. R. Civ. P. 3, Notes of Advisory Committee ¶ 4 ("[Rule 3] provides that the *first step in an action* is the filing of the complaint.") (emphasis added). *Id.* at 1131.
>
> ...
>
> Thus, Washington's arbitration declaration requirement is displaced by those rules in federal court. As there are valid, on-point Federal Rules of Civil Procedure, we need not "wade into *Erie* 's murky waters." *Shady Grove*, 559 U.S. at 398, 130 S.Ct. 1431 (Scalia, J.). We hold that Washington's arbitration declaration requirement does not apply in the federal courts. The district court should have applied the Federal Rules, not RCW 7.70A.020 in this case. *Id.* at 1132.

Based on this overwhelming line of very recent authority from the Second, Fourth, Sixth, Seventh and Ninth Circuits, all within the last few years, where the oldest one is in 2019, if the Third Circuit would consider whether the Affidavit of Merit of Del. Code §6853 is required in a diversity action in Delaware applying Delaware law, I think it is fairly easy to predict that the Third Circuit would follow

this recent line of Circuit authority, with no Circuit ruling to the contrary in the last three years, and it would hold that the Affidavit of Merit is not required to be filed by a Plaintiff in a diversity action under Delaware law. This Honorable Court should do the same as the Third Circuit would do so as not to be an outlier.

Plaintiff Did File Documents Complying with Del Code §6853

Plaintiff, after consultation with the Clerk's Office, did file documents under seal in full compliance with Section 6853 including back-up medical records. Also filed under seal were the Curriculum Vitae of the medical experts giving opinions in the sealed documents, and Plaintiff will disclose that they are Steven M. Raikin, MD, the former chief of the Foot and Ankle Practice at the Rothman Institute and David I. Pedowitz, MD., the successor as the head of the Foot and Ankle Practice at the Rothman Institute. Dr. Raikin had to retire from the practice of medicine in 2022 due to serious medical issues which resulted in major surgery. I did talk to Dr. Raikin at his home, where we wished each other good recoveries, and needless to say he is depressed by being required to retire when at the top of his profession and the leader in his practice area.

But based on the foregoing discussion, Section 6853 is not enforceable in this diversity medical malpractice action, so there is no reason for the Court to conduct an *in camera* review of the documents filed under seal as all defendants have requested by motion. Their motions should be denied.

Respectfully submitted,

/s/ Harold R. Berk

Harold R. Berk, Plaintiff, Pro Se
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CERTIFICATE OF SERVICE

Harold R. Berk, Plaintiff Pro Se, hereby certifies on January 29, 2023 that he caused a copy of the foregoing Memorandum In Opposition to All Defendants Motions for *In Camera* Inspection by the Court of the Sealed Medical Records and Curriculum Vitae of the Opining Physicians by means of the Court's CM/ECF System.

/s/ Harold R. Berk

Harold R. Berk, Plaintiff, Pro Se

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 1:22-cv-1506 RGA

HAROLD R. BERK

Plaintiff,

v.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL MIDDLETOWN, LLC,

Defendants.

TRIAL BY JURY DEMANDED

REPLY BRIEF IN SUPPORT OF MOTION OF DEFENDANT WILSON C. CHOY, M.D. TO DETERMINE IF THE AFFIDAVIT OF MERIT COMPLIES WITH SECTIONS (a)(1) AND (c) OF TITLE 18 §6853

Defendant Dr. Wilson C. Choy (hereinafter "Defendant") respectfully submits this reply brief in support of his request that the Court review the Affidavit of Merit and the *curriculum vitae* that has allegedly been filed under seal by Plaintiff in order to determine whether it complies with Title 18 §6853(a)(1) and (c), and 18 Del. C. § 6854. Dr. Choy re-asserts his arguments set forth in the Opening Brief, adopts the arguments asserted by co-defendants in their respective motions and also states as follows:

1. The crux of Plaintiff's argument in his Answering brief is that the Federal Rules of Civil Procedure conflicts with the state statute at issue in this case. However, inexplicably, Plaintiff concurrently with the filing of his Complaint, filed a request for the one time sixty (60) day extension to file an Affidavit of Merit. D.I.6. This Honorable Court granted the request and Plaintiff was to file a conforming Affidavit of Merit on or before January 23, 2023. D.I. 9.

2. In addition, Plaintiff further asserts that that he provided the requisite Affidavit of Merit and Curriculum Vitae to the Court under seal.

3. Since Plaintiff not only filed an extension to file an Affidavit of Merit and presumably submitted the requisite Affidavit of Merit, Defendant asserts that Plaintiff's arguments, challenging whether the Affidavit of Merit applies, has been waived by plaintiff.

4. Likewise, Plaintiff has cited no District of Delaware or Third Circuit opinion to support his position.

5. Plaintiff's cause of action, is a medical malpractice action against the Defendants. Except for his "primary residence" (even though he has a residence in Delaware), being in Florida, this case would be in state court and Plaintiff would have to comply with the requirements of the Affidavit of Merit since under the statute, "*No health-care negligence lawsuit shall be filed in the State* unless the complaint is accompanied by: 1) an affidavit of merit as to each defendant....." (emphasis added).

6. Furthermore, in *Hopkins v. Frontino*, 2012 WL 32400 (D. Del. 2012), this Honorable Court previously applied Delaware's Affidavit of Merit requirement in dismissing plaintiff's case for failure to comply with

the requirements of the statute. In dismissing the action, the Court held, "State statutes requiring affidavits of merit constitute substantive law that federal court must apply in diversity professional negligence suits." *Id.* at *1.

7. As set forth in its Opening Brief, Defendant has no basis to know whether the *curriculum vitae* establishes that the expert "is licensed to practice medicine as of the date of the affidavit" or whether "in the three years immediately preceding the alleged negligent act [he or she] has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant" or whether "the expert shall be Board Certified in the same or similar field of medicine"

8. Subsection (a)(1) states that if the required affidavit is not filed, the suit shall not be accepted by the Prothonotary.

9. Subsection (d) states that the Affidavit of Merit shall be reviewed in camera to determine whether the Affidavit of Merit complies with paragraphs (a)(1) and (c). WHEREFORE, Defendant Wilson C. Choy, M.D., respectfully requests that the Court review the Affidavit of Merit in camera to determine that it complies with the statute, specifically:

a. That it is signed by an expert witness.

b. That it is accompanied by a *curriculum vitae.*

c. That the Affidavit of Merit states all its opinions to a reasonable degree of medical probability.

d. That it gives an opinion that there has been healthcare medical negligence by EACH defendant.

e. That the expert gives an opinion that each breach by EACH defendant was a proximate cause of injuries alleged in the Complaint.

f. That each *curriculum vitae* establishes that the expert shall be licensed to practice medicine as of the date of the Affidavit as to EACH Defendant that the expert opines is negligent.

g. That as of the date of the Affidavit(s) as to Defendant Wilson C. Choy, M.D., particularly, that the curriculum vitae establishes that the expert(s), for the three years preceding the negligent act, have been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the Dr. Choy which the expert(s) opines negligent.

h. That the expert(s) against the Defendant is / are Board Certified in the same field of medicine as Dr. Choy who the expert(s) opines is negligent.

ELZUFON AUSTIN & MONDELL, P.A.

/s/ Matthew P. Donelson

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Date: February 6, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 1:22-CV-01506-RGA

HAROLD R. BERK,

Plaintiff,

v.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., AND ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants.

TRIAL BY JURY OF 12 DEMANDED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR REVIEW OF AFFIDAVIT OF MERIT

I. Introduction

The instant action arises from alleged healthcare medical negligence by Beebe Medical Center, Inc. and others.[1] The Complaint was filed on 11/18/2022, and alleges, *inter alia*, that Moving Defendant's Emergency Room "physicians, nurses, physicians' assistants and employees owed plaintiff a duty to diagnose and treat plaintiff according to the appropriate medical standard of care" and that "causing additional injury and not doing a post injury Xray was not in accordance with

[1] Plaintiff's Complaint at D.I. 1.

the standard of care of a medical hospital licensed in Delaware." D.I. 1, at ¶¶ 54, 61. Because Beebe Medical Center, Inc. is a healthcare provider within the meaning of 18 *Del. C.* § 6801, and this is a healthcare negligence lawsuit[2], an Affidavit of Merit signed by an expert witness accompanied by a current *curriculum vitae* are required by 18 *Del. C.* § 6853 (a)(1)[3].

Concurrently with the filing of Plaintiff's Complaint, Plaintiff filed a request to this Court for the one-time, sixty-day extension to file an Affidavit of Merit allowable pursuant to the plain language of 18 *Del. C.* § 6853 (a)(2). D.I. 6. The Court granted the request, and Plaintiff was to file a conforming Affidavit of Merit on or before 1/23/2023. D.I. 9.

On 1/17/2023, Plaintiff filed a "Notice of Filing Medical Records Under Seal Satisfying Del. Code § 6853." D.I. 21. On 1/19/2023, Plaintiff filed a "Notice of Documents Filed Under Seal Satisfying Del. Code § 6853." D.I. 25. On 1/20/2023, Plaintiff filed Curriculum Vitas related to these two previous filings. D.I. 26.

The extension of time granted by the Court to file an Affidavit of Merit expired, and Moving Defendant had no basis to know whether Plaintiff's Affidavit of Merit complied with the above statute, or if an Affidavit of Merit was even filed in this matter as

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[2] Notably, Plaintiff seeks to avail himself of the 90-day extension of the two-year statute of limitations available solely to Delaware actions founded in medical negligence. D.I. 1, at ¶ 6.

[3] Hereinafter, Affidavit of Merit Statute.

documents were filed under seal.[4] Therefore, Defendant filed a Motion for Review of Affidavit of Merit. D.I. 32. On 1/29/2023, Plaintiff failed a Response in Opposition to Defendant's Motion for Review of affidavit of merit. D.I. 37. This is Defendant's Reply.

II. Plaintiff's Arguments are premature as there is no controversy until and unless this Court determines the affidavit of merit is non-conforming under Delaware law.

Plaintiff's arguments are premature and ultimately misses the mark. Plaintiff argues that 18 *Del. C.* § 6853 (a)(1) does not apply to diversity jurisdiction, therefore, the Court should not review the affidavit(s) of merit. However Plaintiff also asserts repeatedly that he *has filed* a conforming Affidavit of Merit as required by 18 *Del. C.* § 6853. Therefore, this Court need not decide decide whether or not Plaintiff was required to file an affidavit of merit because, according to Plaintiff, he has already done so. Defendant simply requests the Court review the Affidavit of Merit that presumably has already been filed. There is no issue nor controversy until and unless this Court determines the affidavit of merit is non-conforming under Delaware law. Defendant has not filed a motion to dismiss or other dispositive motion related to a failure to file, or failure to file a conforming Affidavit of Merit.[5] Defendant simply

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[4] As set forth by the Delaware Supreme Court in *Dishmon v. Fucci*, 32 A.3d 338, 344-45 (Del. 2011),"[f]rom the plain language of Section 6853, it is clear that where a party fails to file an Affidavit of Merit with the Superior Court, the Court will not entertain the case."

[5] Defendant reserves the right to file a dispositive motion should this Court find that Plaintiff filed a non-conforming Affidavit of Merit.

requests the action it's entitled to under under 18 *Del. C.* § 6853 once the Affidavit of Merit is filed, as Plaintiff asserts he has done in this case.

III. This Court has determined the Affidavit of Merit statute is a substantive law provision to be followed in diversity cases.

The Delaware statute requires the affidavit of merit to "accompany" the complaint. Del. Stat. Ann. § 6853 provides the following:

> (a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:
>
> (1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court.

This Court, in an unreported decision, held that "[f]ailure to file an affidavit under § 6853 is grounds for dismissal of a state law medical negligence suit." *Hopkins v. Frontino*, 2012 WL 32400, *1 (Jan. 5,

2012)(citations omitted). Moreover, "[s]tate statutes requiring affidavits of merit constitute substantive law that federal courts must apply in diversity professional negligence suits." *Hopkins v. Frontino*, 2012 WL 32400 (Jan. 5, 2012)(*citing Liggon–Redding v. Estate of Robert Sugarman*, 659 F.3d 258, 259–65 (3d Cir. 2011); *Chamberlain v. Giampapa*, 210 F.3d 154, 156–61 (3rd Cir. 2000)); *see also Davis v. Corr. Med. Servs.*, 760 F.Supp. 2d 469, 475-76 (D. Del. 2011); *Wilson v. Cartwright*, 557 F.Supp. 2d 482 (D.Del. 2008). This Court has repeatedly recognized the Delaware statute, 18 *Del. C.* § 6853, which requires an affidavit of merit to accompany the complaint to support state law medical negligence claims. *See, e.g.*, *Hartman v. Corr. Med. Servs.,* 366 F. App'x 453 (3d Cir. 2010); *Davis v. Corr. Med. Servs*., 760 F.Supp. 2d 469 (D.Del. 2011); *Turner v. Kastre*, 741 F.Supp. 2d 578 (D.Del. 2010); *Diaz v. Carroll*, 570 F.Supp. 2d 571 (D.Del. 2008).

In *Hopkins v. Frontino*, 2012 WL 404961, at *1 (D.Del. Feb. 7, 2012), this Court, focused on the "purpose" of the Delaware statute, and found that like the statutes addressed in *Chamberlain and Liggon–Redding*, the Delaware Affidavit of Merit Statute was "designed to reduce the filing of meritless negligence claims, and the penalty for failing to comply is dismissal." *Hopkins*, 2012 WL 404961, at *1. Thus, it held that the statute's requirements were "substantive" and that they were applicable in a federal diversity action. *Id.* at *1. Therefore, based upon prior rulings, this Court should find the Affidavit of Merit Statute constitutes Delaware substantive law and review Plaintiff's Affidavit of Merit *in camera*, that has been filed under seal in this case.

It should also be noted that, in an unpublished opinion, the Third Circuit affirmed the dismissal of Plaintiff's state law medical negligence claims founded in medical negligence based upon the failure to file an affidavit of merit. *Woods v. First Corr. Med., Inc.,* 2011 WL 3627393 (3d Cir. Aug. 18, 2011). To the extent that this Court finds Plaintiff's argument persuasive that the Third Circuit has not held Delaware's Affidavit of Merit Statute constitutes substantive law in a diversity jurisdiction case, Delaware's Affidavit of Merit Statute is similar to the statutes in New Jersey and Pennsylvania that the Third Circuit has expressly held to be substantive law that federal courts must apply in diversity professional negligence lawsuits.[6]

IV. Delaware's Affidavit of Merit Statute is Similar to the affidavit of merit requirements under both Pennsylvania and New Jersey law found to be substantive law by the Third Circuit.

Federal courts exercising diversity jurisdiction must apply the substantive law of the state in which they are located except on matters governed by the U.S. Constitution or federal statutes, while procedural issues are governed by federal law. *Erie R.R. Co. v. Tompkins*, 304 US 64, 78 (1938); *Gasperini v. Center for Humanities, Inc*., 518 US 415, 427, (1996). The effect is that, for substantive law purposes, "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect,

[6] Should the Court reach Plaintiffs' argument that the Third Circuit would find that Delaware's Affidavit of Merit statute is procedural, rather than substantive, Defendant requests the opportunity for parties to submit additional briefing on this issue for the Court's consideration.

only another court of the State...." *Guaranty Trust Co. of New York v. York*, 326 US 99, 108, (1945).

The Supreme Court, in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 419 (2010) (Stevens, J., concurring), discussed issues that arise when considering whether a state statute "collides" with federal procedural rules addressing cases in which "both a federal rule and a state law appear to govern a question before a federal court sitting in diversity." *Id.* The *Shady Grove* Court explained that:

> State procedural rule, though undeniably 'procedural' in the ordinary sense of the term,' may exist 'to influence substantive outcomes' and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim.

Id., citing S*.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist*., 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.)

The Third Circuit has explicitly held that the affidavit of merit requirements under both Pennsylvania and New Jersey law constitute substantive law, and therefore apply in diversity suits. *See Liggon–Redding v. Estate of Sugarman*, 659 F.3d 258, 259-265 (3d Cir. 2011) ("we conclude that Pennsylvania Rule 1042.3, mandating a certificate of merit in professional negligence claims, is substantive law under the *Erie* Rule and must be applied as such by

federal courts."); *Chamberlain v. Giampapa*, 210 F.3d 154, 157 (3d Cir. 2000) (holding that "the New Jersey affidavit of merit statute ... must be applied by federal courts sitting in diversity."). Likewise, Delaware's Affidavit of Merit Statute constitutes Delaware substantive law and must be applied in federal courts.

In *Chamberlain v. Giampapa*, 210 F.3d 154, 158-61 (3d Cir. 2000), the Third Circuit summarized the jurisprudence of the Supreme Court and other courts concerning the *Erie* Rule, and set out a three-part test to determine whether a state law is substantive or procedural for purposes of compliance with the *Erie* Rule. First, a court must determine whether there is a direct collision between a federal rule and the state law or rule that the court is being urged to apply. *Id.* If there is a direct conflict, the federal court must apply the federal rule and reject the state rule. If there is no "direct collision," then the court applies the Erie Rule to determine if state law should be applied, by evaluating the second and third prongs of the *Chamberlain* test. *Chamberlain*, 210 F.3d at 159-161. In the second part of the *Chamberlain* test, a court must determine whether the state law is outcome-determinative and whether failure to apply the state law would frustrate the twin aims of the Erie Rule to discourage forum shopping and avoid inequitable administration of the law. *Id*. Third, the court must consider whether any countervailing federal interests prevent the state law from being applied in federal court. *See id*.

In *Chamberlain*, the Third Circuit held that neither Fed. R. Civ. P. 8 nor 9 conflicted with a New Jersey Affidavit of Merit statute. *See* 210 F.3d at 159-60. Ultimately, the New Jersey Affidavit of Merit

statute was found to be substantive New Jersey law. In *Liggon–Redding v. Estate of Sugarman*, the Third Circuit analysis of the Pennsylvania Certificate of Merit requirement was also held not to "collide" with Federal Rules of Civil Procedure 7, 8, 9, 11 and 41(b), thus constituting substantive Pennsylvania law. 659 F.3d 258, 259-265.

In Delaware, medical negligence is defined by statute. In 1976, the Delaware General Assembly adopted the Delaware Health Care Negligence Insurance and Litigation Act, codified at 18 Del. C. ch. 68, in response to what was described as a "medical malpractice crisis." *See*, *Lacy v. Green*, 428 A.2d at 1174-175; *also see*, *DiFilippo v. Beck*, 520 F. Supp. 1009 (D. Del. 1981). In 2003, the Delaware General Assembly created the requirement for an "affidavit of merit" to be filed with any complaint alleging medical/health care negligence in order for such litigation to proceed. *See*, 18 *Del. C.* §6853; H.B. 310, 142d Gen. Assem., Reg. Sess. (Del. 2003). "The intent of the General Assembly in enacting this provision was to reduce the filing of meritless medical negligence claims." *Beckett v. Beebe Med. Ctr., Inc.,* 897 A.2d 753, 757 (Del. 2006).

Delaware's Affidavit of Merit Statute is a condition precedent for bringing most lawsuits for medical negligence in Delaware. Although not required in all cases, when necessary, the affidavit is confidential, filed under seal, and should accompany the Complaint. Notably, a 60-day extension of time to file the affidavit is provided by statute. The affidavit of merit is not a pleading, nor attached to a pleading. The contents of the affidavit are filed under seal, never known to the defense, nor are they required to contain factual allegations. The requirements of the

Affidavit of Merit exist separate and apart from any pleadings. There is no direct collision between the Delaware Affidavit of Merit statute and Fed. R. Civ. P. 3, 8, 9, 11 nor 12(b)(6). Moreover, even if there was a "collision", according to *Shady Grove*, the "conflict with a federal rule does not doom a state law that effects substantive goals by procedural aims." 559 U.S. at 419. Failure of this Court to apply the Delaware Affidavit of Merit statute would frustrate the twin aims of the *Erie* Rule to discourage forum shopping and avoid inequitable administration of the law. Finally, there is no countervailing federal interests that prevent this Delaware law from being applied in federal court.

This Court should find the Affidavit of Merit statute constitutes Delaware substantive law and review Plaintiff's Affidavit of Merit *in camera*, that has been filed under seal in this case.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Lorenza A. Wolhar
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DATED: February 6, 2023

CERTIFICATE OF SERVICE

I, Lorenza A. Wolhar, hereby certify that on this 6th day of February, 2023, that the Memorandum of Points and Authorities In Support of Defendant's Motion For Review of Affidavit of Merit has been served on *Pro se* Plaintiff, Harold R. Berk, via CM/ECF Filing.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

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Dated: February 6, 2023

[FILED: February 7, 2023]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-cv-1506-RGA

HAROLD R. BERK,
Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,
Defendants

JURY TRIAL DEMANDED

MOTION FOR LEAVE TO FILE SUR-REPLY MEMORANDUM

Plaintiff Harold R. Berk, Pro Se, moves this Honorable Court to order that he be granted leave to file a Sur-Reply Memorandum in Response to the Reply Memos filed by all three defendants on February 6, 2023 concerning their Motions for *In Camera* Inspection of the Documents filed under Seal. The proposed Sur-Reply Memo is attached as Exhibit A.

Respectfully, submitted,

/s/ Harold R. Berk
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CERTIFICATE OF SERVICE

Plaintiff Harold R. Berk, Pro Se, has this 7th day of February, 2023 served this Motion for Leave to File Sur-Reply Memo and the Proposed Sur-Reply Memo upon counsel for all defendants through the Court's CM/ECF system.

/s/ Harold R Berk
Harold R. Berk, Plaintiff, Pro Se

EXHIBIT A

CIVIL ACTION NO. 22-cv-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

PLAINTIFF HAROLD R. BERK, PRO SE, SUR-REPLY MEORANDUM TO THE REPLY MEMORANDA FILED BY EACH DEFENDANT IN SUPPORT OF THEIR MOTIONS FOR *IN CAMERA* INSPECTION BY THE COURT OF THE MEDICAL RECORDS FILED UNDER SEAL

This action was filed as a medical malpractice action against each defendant, but on January 30, 2023, Plaintiff filed an Amended Complaint, as a matter of right, which added three additional causes of action: one for intentional Assault and Battery against defendant Beebe Medical Scenter, Inc. and one for intentional Assault and Battery against defendant Encompass Health Rehabilitation Hospital of Middletown, LLC. There was also a cause of action against defendant Beebe for lack of proper training of emergency room personnel to avoid actions which aggravate and extend a recently admitted patient's

injured and fractured body parts, in this case his left ankle. The causes of action for Assault and Battery are not medical malpractice claims which involve medical negligence, rather they are intentional torts. As such, the Assault and Battery causes of action are not subject to any filing requirements applicable to medical negligence claims in this diversity jurisdiction action.

Plaintiff in his Memorandum In Opposition to the Motions for *In Camera* Inspection of Medical Records filed Under Seal cited a number of Circuit Court of Appeals decisions all issued within the last three years from the Second, Fourth, Sixth, Seventh and Ninth Circuits and all of which hold, for various reasons, that state affidavit of merit or certificate of merit requirements do not apply to medical malpractice cases under the court's diversity jurisdiction due to conflict between various Rules of the FRCP and the state requirements. No defendant has even discussed any of those recent Circuit Court decisions, so Plaintiff's discussion and quotation of them must stand and be accepted. Plaintiff argues that the Third Circuit, which last substantively considered the issue around 2011, would apply the nearly unanimous Circuit Court decisions' reasoning to the Delaware statutes and hold the affidavit of merit is not applicable in a diversity action in Delaware.

Defendants did not discuss a case Plaintiff discussed in his Memorandum, *Jones v. Mirza,* No. 15-1017-RGA (D. Del. 2016), where a pro se plaintiff did not file an affidavit of merit in a medical malpractice case, but this Honorable Court granted the plaintiff leave to file an Affidavit of Merit after filing the Complaint.

Defendants did cite *Hopkins v. Frontino,* No. 11-900-RGA (D. Del. 2012) where the Court dismissed a medical malpractice diversity case in 2012 due to the lack of an Affidavit of Merit. But the dismissal was without prejudice. Then the plaintiff filed a new action under 12-316-LPS, and that was dismissed as the events constituting malpractice occurred in 2009, so it was dismissed as outside the two-year statute of limitations. None of those cases was decided after the recent weight of Circuit Court authority with decisions in the Second, Fourth, Sixth, Seventh and Ninth Circuits all decided between 2019 and 2022.

Defendant Encompass cited a Third Circuit case, *Woods v. First Correctional Medical, Inc.,* 446 F. Appx 400 (3d Cir. 2011), where in another pro se appeal, the court included a one sentence statement that: "Under Delaware state law, when a party alleges medical negligence, that party is required to produce an affidavit of merit, signed by an expert witness when the complaint is filed." The Court declared the Per Curiam opinion was Not-Precedential. That is the totality of the Third Circuit's 2011 decision there which did not, in that pro se appeal, discuss the conflict between Del Code §6853 and various Rules of the FRCP as has motivated the recent Circuit Courts of Appeal to hold that affidavits of merit do not apply in diversity jurisdiction actions. Plaintiff submits that 12 years after *Woods*, the Third Circuit would follow the great weight of authority from the other recent Circuit decisions.

Plaintiff must note to the court that though the state statutes were adopted to deal with high numbers of malpractice cases, in reality those provisions demonstrate effective lobbying by the medical industry to make it very difficult to file

medical malpractice cases even with excellent claims. As part of that lobbying effort, the American Medical Association changed its rulings from imposing an affirmative obligation on doctors to give medical opinions for their own patients in cases of medical malpractice by others, to say it was voluntary to do so. As a consequence, many medical providers flat out refuse to give medical opinions on another doctor's malpractice and say that they will not get involved in litigation even involving their own patients. Unlike lawyers who have ethical duties to report cases of professional malpractice and ethics rules violations, doctors have succeeded in removing any similar obligation on them. Lawyers are doing a better job promoting professional ethics than are doctors who have their own shield by refusing to give any opinion on medical malpractice.

Finally, defendants would have the Court engage in an *in camera* review of the Medical Records Plaintiff did file under seal, though the recent Circuit Court decisions uniformly state that such reviews are unnecessary as affidavits of merit should not be required in diversity cases due to the conflict between the affidavit of merit and various Rules of the FRCP.

For these additional reasons, the defendants' Motions should be denied.

Respectfully, submitted,

/s/ Harold R. Berk
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UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

Case No. 1:22-cv-01506 RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

TRIAL BY JURY OF TWELVE DEMANDED

DEFENDANT ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC ("Defendant" or "Encompass Health"), by and through undersigned counsel, hereby moves to dismiss Plaintiff Howard Berk's Amended Complaint ("Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(6), as follows:

I. INTRODUCTION

On August 11, 2020, Plaintiff sent a Notice of Intent to Investigate to the above-captioned parties pursuant to 18 *Del. C.* § 6856(4) to avail himself of

the 90-day tolling of the statute of limitations for any perceived medical negligence claims.

Plaintiff instituted this civil action by filing his Complaint on November 18, 2022. (D.I. 1). Plaintiff's Complaint asserts claims of medical negligence against several defendants, including Defendant Encompass Health. *Id.* In his Complaint, Plaintiff alleges he injured his leg on (1) August 20, 2020, when he was taken by fire ambulance to the emergency room at Beebe Hospital; and (2) when he was at Encompass Health Rehabilitation Hospital of Middletown between August 23 to September 7, 2020. *Id.* Defendant Encompass Health accepted service of Plaintiff's Complaint on November 21, 2022, and timely filed its Answer on January 20, 2023. (D.I. 11, 27).

Plaintiff also filed a Motion to Extend Time to File his Expert Opinion or Affidavit as required by to 18 *Del. C.* § 6853. (D.I. 6). On or around January 20 or 23, 2023, Plaintiff submitted his expert report pursuant to Del C. § 6853. (D.I. 22, 23, 25, 26).

On January 24, 2023, Defendant Encompass Health filed a Motion to Determine if [Plaintiff's] Affidavit of Merit Complies with Section (a)(1) and (c) of Title 18 § 6853 ("Motion to Test Affidavit"). (D.I. 34). Thereafter, Plaintiff contemporaneously filed his opposition to Defendant's Motion to Test Affidavit and an Amended Complaint adding claims of assault and battery against Defendants Encompass Health and Beebe Medica Center, Inc. (D.I. 37, 38). Plaintiff also seeks recovery for punitive damages from Defendant Encompass Health for the first time in his Amended Complaint. (D.I. 38 at ¶ 108).

Plaintiff's Amended Complaint and claims for assault and battery against Defendant Encompass Health should be dismissed because they are barred by the applicable statute of limitations.

II. APPLICABLE LAW

"Pursuant to the *Erie* Doctrine, '[a] federal court sitting in diversity must apply state substantive law and federal procedural law.'" *Schmigel v. Uchal,* 800 F.3d 113, 119 (3d Cir. 2015) (quoting *Chamberlain v. Giampapa*, 210 F.3d 154, 158 (3d Cir. 2000)). "This substantive/procedural dichotomy of the *'Erie* rule' must be applied with the objective that 'in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court [will] be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Id.*

In the present case, all of Plaintiff's claims arise out of conduct that occurred in Delaware. (D.I. 1). Moreover, Plaintiff himself appears to concede Delaware substantive law applies to his claims via his motion to extend time to submit an affidavit of merit in compliance with 18 *Del. C.* § 6853. (D.I. 6). Thus, Delaware substantively law applies in this diversity jurisdiction matter.

III. STANDARD OF REVIEW

Upon a motion to dismiss pursuant to F.R.C.P. 12(b)(6), the Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under F.R.C.P. 12(b)(6) ... is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved."

Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir.1990) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir.1988)).

IV. ARGUMENT

Plaintiff's new claims should be dismissed as they are barred by the applicable statute of limitations. Plaintiff's newly added personal injury claims of assault and battery are governed by a two-year statute of limitations. 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained ..."); *Lankford v. Scala*, 1995 WL 156220, *1 (Feb. 28, 1995)(assault and battery claims in Delaware are governed by a two-year statute of limitations").

Defendants generally bear the burden of proving a limitations period has lapsed and the applicable claims are time-barred. However, "[w]hen a complaint asserts a cause of action that on its face accrued outside the statute of limitations ... the plaintiff has the burden of pleading facts leading to a reasonable inference that one of the tolling doctrines adopted by Delaware courts applies."[1]

Plaintiff's alleged injury as a result of Defendant Encompass Health occurred on September 7, 2020, at the latest. (D.I. 1 at ¶ 32 ("Plaintiff was discharged from Encompass on September 7, 2020")). However, he waited more than 28 months to file his Amended Complaint asserting state personal injury claims. (D.I. 38).

---

[1] *Rogers v. Bushey*, 2018 WL 818374 at *4 (Del. Super. Feb. 7, 2018) (quoting *Winner Acceptance Corp. v. Return on Capital Corp*., 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008)).

The Delaware Superior Court in *Lankford v. Scala* was faced with a motion to dismiss plaintiff's assault and battery civil claims (among others) based upon the applicable statute of limitations. 1995 WL 156220 at *5. In *Lankford*, the Court determined that the operative complaint had been filed more than two years after the alleged conduct giving rise to the cause of action. *Id.* The *Lankford* Court dismissed all of plaintiff's personal injury claims as untimely pursuant to Delaware's two-year statute of limitations. *Id. See Issa v. Delaware State University,* 268 F.Supp.3d 624, 631 n.1 (quoting *First Marblehead Corp. v. House,* 473 F.3d 1, 8 n. 7 (1st Cir. 2006))("'We note that Delaware permits the citation of unpublished decisions as precedent.'").

A similar result is warranted here. Plaintiff alleges personal injuries as a result of his time at Encompass Health Rehabilitation Hospital in Middletown as late as September 7, 2020, when he was discharged. (D.I. 1 at 32). Yet, he failed to file his Amended Complaint alleging intentional torts of assault and battery until January 30, 2023. His assault and battery claims on their face are barred by the applicable two-year statute of limitations.

Even if Plaintiff argues that the new claims in his Amended Complaint relate back to the date of his original pleading on November 18, 2022, his claims are still untimely. F.R.C.P. 15(c) allows claims added via an amended pleading to relate back to the date of original pleading under certain circumstances, including when the amendment asserts a claim that arose out of the conduct, transaction or occurrence set out in the original pleading. F.R.C.P. 15(c)(1)(B).

Plaintiff may argue that his new claims arose out of the same alleged conduct as the claims he asserted

in his Original Complaint. However, Plaintiff filed his Original Complaint more than two years after the alleged negligent conduct on behalf of Encompass Health. Because Plaintiff sent a Notice of Intent to Investigate to the above-captioned parties on August 11, 2022 (before the two-year statute of limitations on his claims ran), he will argue the statutory period to file any medical negligence action arising out of the alleged conduct in August and/or September 2020 was tolled by 90-days pursuant to 18 *Del. C.* §§ 6853; 6856.

The same is not true for Plaintiff's alleged intentional torts. Arguing his new claims relate back to the Original Complaint will not cure his defect. Because Plaintiff's new claims asserted against Defendant Encompass Health in his Amended Complaint are barred by the applicable statute of limitations, Plaintiff's Amended Complaint should be dismissed in its entirety.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that Plaintiff's Amended Complaint, and all new causes of action alleged against Encompass Health Rehabilitation Hospital of Middletown, LLC contained therein, including Count VI, be dismissed.

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC
/s/ Jessica L. Reno
Colleen D. Shields (DE No. 3138)
Jessica L. Reno (DE No. 5950)
222 Delaware Avenue, Suite 700
Wilmington, DE 19801
302-574-7400
Attorneys for Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC

Dated: February 13, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 1:22-cv-1506 RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

TRIAL BY JURY DEMANDED

ANSWER OF DEFENDANT WILSON C. CHOY, M.D. TO PLAINTIFF'S AMENDED COMPLAINT

1. Answering defendant has no knowledge or information sufficient to form a belief as to the truth of all the averments of this paragraph of the Complaint. Having said that, at this point answering defendant does not have any information to the contrary.

2. Admitted.

3. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party.

4. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party.

5. Admitted that this is an action for damages as described by the Plaintiff but denied that there was any substandard care provided by the answering defendant. By way of further response, all allegations of wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

6. The first sentence is admitted. It is also admitted that a copy of a letter dated August 11, 2022, as described in this paragraph is attached. The cited statute speaks for itself.

7. Admitted.

FACTS

8. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

9. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

10. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

11. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

12. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

13. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are

denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

14. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

15. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

16. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

17. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and

discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

18. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

19. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

20. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

21. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

22. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

23. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

24. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

25. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

26. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

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29. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

30. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. D'Ambrosio, the same are denied.

31. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

32. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and

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33. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

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36. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

37. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

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39. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing,

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42. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

43. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are

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44. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

45. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

46. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

47. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and

discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

48. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

49. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

50. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

51. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

52. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

FIRST CAUSE OF ACTION – MEDICAL NEGLIGENCE BEEBE MEDICAL CENTER[1]

53. The allegations in paragraphs 1 through 52 are incorporated by reference as though set forth in full.

54. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

55. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers

[1] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint.

any wrongdoing on behalf of Dr. Choy, the same are denied.

56. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

57. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

58. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

59. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

60. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

61. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

62. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

63. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

64. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

SECOND CAUSE OF ACTION – MEDICAL NEGLIGENCE WILSON C. CHOY M.D.[2]

65. The allegations in paragraphs 1 through 64 are incorporated by reference as though set forth in full.

66. The allegations in this paragraph of the Complaint are admitted solely to the extent that they are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

67. The allegations in this paragraph of the Complaint are admitted solely to the extent that they

[2] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint. Denied.

are proven by the relevant medical records and discovery in this case. Except as admitted, the allegations in this paragraph of the Complaint are denied. To the extent that the allegations in this paragraph of the Complaint allege wrongdoing, whether expressed or implied, and whether in whole or in part, as to Dr. Choy, the same are denied.

68. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

69. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

70. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

71. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

72. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

73. The allegations in this paragraph are denied to the extent that it implies or infers any wrongdoing on behalf of Dr. Choy.

THIRD CAUSE OF ACTION – MEDICAL NEGLIGENCE ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC[3]

[3] The use of the heading in the answer is not agreement with the substance of the heading, but only to conform the answer in form, to the complaint.

74. The allegations in paragraphs 1 through 73 are incorporated by reference as though set forth in full.

75. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

76. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

77. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

78. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

79. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

80. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

FOURTH CAUSE OF ACTION – ASSAULT AND BATTERY BEEBE MEDICAL CENTER, INC.

81. The allegations in paragraphs 1 through 80 are incorporated by reference as though set forth in full.

82. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

83. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

84. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

85. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

86. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

87. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers

any wrongdoing on behalf of Dr. Choy, the same are denied.

88. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

89. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

90. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

91. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

92. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

93. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

94. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

95. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

FIFTH CAUSE OF ACTION – FAILURE TO TRAIN BEEBE MEDICAL CENTER, INC.

96. The allegations in paragraphs 1 through 95 are incorporated by reference as though set forth in full.

97. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

98. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

99. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

100. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers

any wrongdoing on behalf of Dr. Choy, the same are denied.

SIXTH CAUSE OF ACTION – ASSAULT AND BATTERY ENCOMPASS REHABILITATION HOSPITAL OF MIDDLETOWN, LLC

101. The allegations in paragraphs 1 through 100 are incorporated by reference as though set forth in full.

102. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr Choy the same are denied

103. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

104. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

105. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

106. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

107. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

108. The allegations in this paragraph of the Complaint are manifestly intended to be answered by another party. To the extent that it implies or infers any wrongdoing on behalf of Dr. Choy, the same are denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

109. The complaint is barred by relevant statute of limitations.

SECOND AFFIRMATIVE DEFENSE

110. On its face, the allegations fail to state a claim upon which punitive damages may be assessed.

THIRD AFFIRMATIVE DEFENSE

111. Any negligence was on the part of another party of which Answering Defendant is not responsible for and/or beyond its control.

FOURTH AFFIRMTIVE DEFENSE

112. Plaintiff's own negligence exceeds Answering Defendant's alleged negligence and his claims are barred and/or damages should be reduced under the applicable comparative negligence statutes.

FIFTH AFFIRMATIVE DEFENSE

113. Plaintiff failed to mitigate his damages.

SIXTH AFFIRMATIVE DEFENSE

114. Any negligence was on the part of another party which was a superseding and/or intervening cause of Plaintiff's injuries.

SEVENTH AFFIRMATIVE DEFENSE

115. Answering Defendant adopts and reserves the right to set forth any affirmative defenses plead by another party in this case.

EIGHTH AFFIRMATIVE DEFENSE

116. Plaintiff failed to file the requisite Affidavit of Merit and the *curriculum vitae* that must be filed with the Complaint in order to determine whether it complies with Title 18 §6853(a)(1) and (c), and 18 Del. C. § 6854.

NINTH AFFIRMATIVE DEFENSE

117. Answering Defendant specifically reserves the right to set forth additional affirmative defense as revealed by discovery.

CROSS-CLAIMS

118. The Answering Defendant cross-claims against his co-defendants solely for the purpose of permitting the finder of fault to apportion fault if any fault is found, *Ikeda v. Molock*, Del. Supr., 603 A.2d 785 (1991) and, in the applicable case, to permit the Answering Defendant to seek contribution, reduction, etc. pursuant to the provision of any joint tortfeasor release, which in the future, may be executed by Plaintiff.

ANSWER TO ALL PRESENT AND FUTURE CROSSCLAIMS

119. Answering Defendant denies all cross-claims now or hereinafter asserted against him.

WHEREFORE, Dr. Choy demands that the Plaintiff's claims for relief be denied and that judgment be entered in his favor plus costs.

ELZUFON, AUSTIN &
MONDELL, P.A.

/s/ Matthew P. Donelson
JOHN A. ELZUFON
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MATTHEW P. DONELSON
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jelzufon@elzufon.com
mdonelson@elzufon.com
Counsel for Defendant Wilson C. Choy, M.D.

Dated: February 13, 2023

[FILED: February 24, 2023]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-cv-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., BEEBE MEDICAL CENTER, INC., and ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

MOTION TO WITHDRAW THE FOURTH, FIFTH AND SIXTH CAUSES OF ACTION FROM PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Harold R. Berk, Pro Se, hereby Moves this Honorable Court to Withdraw and Strike the Fourth, Fifth and Sixth Causes of Action from Plaintiff's Amended Complaint, and in support he shows the Court the following:

1. Defendants have filed motions to dismiss the Fourth, Fifth and Sixth Causes of Action in Plaintiff's Amended Complaint based upon expiration of the Statute of Limitations applicable to the claims at the time of filing.

2. The Fourth, Fifth and Sixth Causes of Action repeated factual allegations from the Original Complaint and really added nothing new to the litigation except for the categorization of the claims as ones for assault and battery and lack of training of Beebe Emergency Department staff, but the factual basis for those claims are already included in the First, Second and Third Causes of Action which remain.

3. Plaintiff will therefore proceed on the original allegations in the Frist, Second and Third Causes of Action as stated in the Amended Complaint which did not amend those claims or causes of action in any respect.

4. Plaintiff filed a Motion to Strike Defendants' Motions to Dismiss to the extent that they affected or sought to dismiss the First, Second and Third Causes of Action since no Defendant has provided any basis, factual or legal, for their motion to dismiss those Causes of Action, and Defendants have yet to respond to Plaintiff's Motion to Strike.

WHERFORE, Plaintiff moves this Honorable Court to permit Plaintiff to withdraw the Fourth, Fifth and Sixth Causes of Action from Plaintiff's Amended Complaint.

Respectfully submitted,

/s/ Harold R. Berk

Harold R. Berk, Plaintiff, Pro Se
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882
haroldberk@gmail.com

CERTIFICATE OF SERVICE

Harold R. Berk, Plaintiff, Pro Se, hereby certifies that he did serve the foregoing Motion to Withdraw the Fourth, Fifth and Sixth Causes of Action from Plaintiff's Amended Complaint upon all defendants on February 24, 2023 by means of the Court's CM/ECF System.

/s/ Harold R. Berk
Harold R. Berk, Plaintiff, Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 22-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., *et al.*,

Defendants

ORDER

WHEREAS, Defendants Encompass Health Rehabilitation Hospital of Middletown, LLC and Beebe Medical Center, Inc. have filed Motions to Dismiss on February 13, 2023 (D.I. 44; D.I. 46);

WHEREAS, an Answering Brief or response pursuant to the Local Rules was set for February 27, 2023, and to date none has been filed;

NOW THEREFORE, IT IS HEREBY ORDERED that, Plaintiff shall file an Answering Brief or response to the Motions to Dismiss by **March 15, 2023**. If Plaintiff fails to respond to the motions they will be decided on the papers submitted.

3/1/2023
Date

/s/ Richard G. Andrews
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 22-cv-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D.;BEEBE MEDICAL CENTER, INC;
ENCOMPASS HEALTH REHABILITATION HOSPITAL OF
MIDDLETOWN, LLC,

Defendants

JURY TRIAL DEMANDED

PLAINTIFF'S RULE 26(f) INITIAL DISCLOSURES

1. Witnesses for Plaintiff- Potential
   Harold R. Berk
   Joan S. McClure, plaintiff's wife
   Wilson Choy, MD
   Bryan Pepper, PA Dr. Choy's office (former)
   Kimberly Gardner, MD Beebe
   Kristin Sutton PT Beebe
   Lindsay Hetrick, RN Beebe
   Julia Deakyne, RN Beebe
   Keith Perry, RN Beebe
   Crystal Demattia, RNBeebe
   Michael Cortes, MD Beebe
   Steven M. Raikin. MD, retired, formerly head of Foot and Ankle practice at Rothman Institute

David Pedowitz, MD, head of Foot and Ankle practice at Rothman Institute
Michael Labarca, RN Encompass
Rashmi Kandelwahl, MD Encompass
Lucas Brady, PT Encompass
Natasha Jackson, RNT Encompass
Decontee Barlee, RN Encompass
Cynthia Griffin, RN Encompass

Other potential witnesses including additional expert witnesses

2. Plaintiff's Damages

Medicare Medical Expenses approved $353,381.53 as of October, 2021

Pain and Suffering $1,059,955

Punitive Damages $2,000,000

TOTAL DAMAGES: $3,413,336

Additional Medical Expenses are being incurred for continuing treatment including podiatrist, neurologist, vascular surgeon and others.

3. Discovery

Beebe witnesses to be available for videotaped depositions on March 24 and 28, 2023.

Dr. Choy and Mr. Pepper in April, 2023 to be determined

Plaintiff Preparing Requests for Production and Interrogatories to all defendants.

Plaintiff drafting Stipulation on physician reading and interpretation of Initial Xrays and September, 2020 XRays.

/s/ Harold R Berk
Harold R. Berk, Plaintiff, Pro Se
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882
haroldberk@gmail.com

CERTIFICATE OF SERVICE

Harold R. Berk, Plaintiff Pro Se, hereby certifies that he served the foregoing Plaintiff's Rule 26(f) Initial Disclosures upon counsel for all defendants on this March 1, 2023 by means of the Court's CM/ECF System.

/s/ Harold R Berk
Harold R. Berk, Plaintiff, Pro Se

[LOGO]

Eckert Seamans Cherin & Mellott, LLC
222 Delaware Avenue 7th Floor
Wilmington, DE 19801
TEL: 302 574 7400
FAX: 302 574 7401

Jessica L. Reno
302.552.2908
jreno@eckertseamans.com

March 8, 2023

VIA ECF/CM

The Honorable Richard G. Andrews
United States District Court for the District of Delaware
J. Caleb Boggs Federal Building
844 North King Street, Unit 9
Wilmington, Delaware 19801

RE: Berk v. Choy, M.D., et al., Case No. 1:22-cv-01506-RGA

Dear Judge Andrews,

We write jointly on behalf of Defendants Wilson C. Choy, M.D. ("Dr. Choy"), Beebe Medical Center, Inc. ("Beebe"), and Encompass Health Rehabilitation Hospital of Middletown, LLC ("Encompass") (collectively "Defendants"), to provide an update regarding the status of discovery in the above-referenced matter and to request a scheduling conference with Your Honor.

Your Honor issued a scheduling order on January 23, 2023 (D.I. 30), with a discovery cutoff deadline of May 23, 2023. The parties met initially to discuss a discovery plan pursuant to F.R.C.P. 26(f) on February

22, 2023. Having made little progress on February 22, we have since scheduled two additional teleconferences on February 27 and March 7, to which Mr. Berk failed to appear. Defendants anticipate a scheduling conference with Your Honor would be the most efficient way to resolve outstanding discovery issues.

At a minimum, Defendants seek to obtain a deadline by which Mr. Berk will submit his expert disclosures in this matter. In addition, deposition dates offered by Dr. Choy have been declined for one reason or another, by Mr. Berk and/or Defendants. Defendants also wish to address the pending motions to discuss the most efficient way to resolve them in light of recent case developments.

We are now approaching the half-way point to discovery cut-off in this matter with little progress made, by no fault of Defendants. Defendants will continue to work with Mr. Berk to conduct fact discovery and schedule depositions, but a scheduling conference will certainly expedite the process given the impending discovery deadline.

Defendants therefore respectfully request a scheduling conference in the interest of efficiency, and in an effort to compel the parties' cooperation and collaboration to conduct discovery pursuant to Your Honor's January 23, 2023, scheduling order.

As always, Counsel is available at the convenience of the Court.

Respectfully submitted,

/s/ Jessica L. Reno
JESSICA L. RENO
COLLEEN D. SHIELDS

Cc: All Parties

HAROLD R. BERK
17000 SW Ambrose Way
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215-896-2882 mobile
haroldberk@gmail.com
haroldrberk.substack.com

March 8, 2023

The Honorable Richard Andrews
United States District Judge
J. Caleb Boggs Federal Building
844 N. King Street
Unit 9
Room 6325
Wilmington, DE 19801-3555

Dear Judge Andrews:

This case should have settled before litigation. I dealt with the representatives of the insurance carriers for Beebe and Encompass for almost two years before finally determining that litigation was necessary as no negotiations took place despite many offers by me to settle.

In our Rule 26(f) conference, I agreed to contact Dr. Steven Raiklin, my treating orthopedic surgeon within five days, and I have done so. Unfortunately, Dr. Raikin is still dealing with his emotional trauma from being required for medical reasons to abandon his practice of medicine at age 59 and when he was at the top of his game as head of the foot and ankle practice at Rothman. That is a tough pill for anyone to swallow.

As to discovery I previously filed a list of witnesses for depositions. With cooperation from counsel for Beebe, we have scheduled depositions of Beebe staff

on March 24, 2023 and March 28, 2023 at a hotel in Rehoboth. This morning I bought airline tickets to fly to Philadelphia for those depositions in Rehoboth.

Counsel for Dr. Choy wanted deposition dates in May, one being May 15, or thereabouts, and I objected saying that was too late in light of Your Honor's discovery deadline. Counsel for Dr. Choy said they would look for dates in April, but I have heard nothing further from them.

I still have to schedule depositions of Encompass people who were identified in my filing.

No defendant has identified any deposition they wish to take.

I was hospitalized for post-surgery complications resulting in another hematoma in my left groin, and I was only discharged yesterday. Defendants knew I was hospitalized at least as of yesterday.

On our follow-up Rule 26 conference, I got tied up and missed the scheduled time but tried to get on a half hour late, but no one was available or willing to join.

I have just received the first defense request for my release to obtain medical records which I received while in the hospital. The other two defendants have not even sent me their form of release.

At our first Rule 26(f) conference counsel for Beebe wanted to apply for an extension of Your Honor's discovery deadline, saying it was unreasonable, and I disagreed saying let's see what we can get done first.

Rule 26(f) says among topics, counsel should discuss is settlement, I raised settlement but no defendant was even willing to discuss settlement.

I have no objection to a Conference with Your Honor but I request it be by remote access so that I do not have to fly to Delaware, but I will if need be.

As Your Honor knows I cooperate with opposing counsel which can be seen in *Berk v. Terumo Medical Corporation*, No. 23-10, where we submitted a Joint Stipulation for alteration of dates for my Brief and the defense Reply Brief, and Your Honor has agreed to our Joint Stipulation.

Outside of my hospitalization, my main problem is getting Dr. Rankin's cooperation, as he said to me in my last call, "I am not even a doctor anymore."

Thank you for your attention.

Respectfully,

/s/ Harold R. Berk
Harold R. Berk, Plaintiff, Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 22-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., et al.,

Defendants

ORDER TO SHOW CAUSE

The recent flurry of activity in this case led to me reviewing the docket and noticing the motions for in camera review of affidavit of merit (D.I. 32, 33, 34) filed by three defendants. Upon cursory review of the two sealed filings (D.I. 23, 26), I do not see anything that looks like an affidavit, let alone an affidavit of merit. The latter filing consists of internet printouts about two doctors. The former filing consists of Plaintiff's medical records.

It is possible I am overlooking something. Therefore, Plaintiff is ORDERED TO SHOW CAUSE within one week as to whether there are one or more "affidavits of merit" compliant with Delaware statute, and if so, tell me precisely where I might find them. Otherwise, I will need to dismiss the case.

IT IS SO ORDERED this 9th day of March 2023.

/s/ Richard G. Andrews
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 22-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., et al.,

Defendants

ORDER DISMISSING CASE

For the reasons stated in the accompanying Memorandum, upon review of Defendants' motions for in camera review of affidavit of merit (D.I. 32, 33, 34), I have determined Plaintiff has not complied with Delaware's affidavit of merit statute.[1] Plaintiff's three medical negligence counts are DISMISSED without prejudice. Plaintiff's motion to withdraw fourth, fifth, and sixth causes of action (D.I. 53) is GRANTED. The other pending motions (D.I. 44, 46, 50, 72) are DISMISSED as moot. As all claims have been dismissed or withdrawn, the Clerk of Court is directed to CLOSE the case.

IT IS SO ORDERED this 4th day of April 2023.

/s/ Richard G. Andrews
United States District Judge

---

[1] I GRANT Plaintiff's motion for leave to file a sur-reply. (D.I. 42).

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 22-1506-RGA

HAROLD R. BERK,

Plaintiff,

vs.

WILSON C. CHOY, M.D., et al.,

Defendants

ORDER

At Wilmington, this 11th day of April 2023, having considered the Court's dismissal of Plaintiff's claims in this matter (D.I. 73, 74), and Cross Claimaints' letter stating that they do not oppose dismissal of their crossclaims without prejudice (D.I. 80);

IT IS HEREBY ORDERED that Cross Claimants' crossclaims (D.I. 18 at ¶ 89; D.I. 20 at 12; D.I. 45 at ¶ 118) are DISMISSED without prejudice.

/s/ Richard G. Andrews
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

———

No. 23-1620

———

HAROLD R. BERK,

Plaintiff-Appellant

v.

WILSON C. CHOY, MD, *et al.*,

Defendants-Appellees,

———

On Appeal from the United States District Court
for the District of Delaware
No. 1:22-cv-01506-RGA (Hon. Richard G. Andrews)

MOTION TO TAKE JUDICIAL NOTICE AND FOR PERMISSION TO INCLUDE DOCUMENTS IN JOINT APPENDIX

R. Stanton Jones
Andrew T. Tutt
Samuel I. Ferenc
Minjae Kim
Katie Weng
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KAYE SCHOLER LLP
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Counsel for Plaintiff-Appellant Harold R. Berk

Pursuant to Federal Rule of Evidence 201, and in connection with Appellant Harold R. Berk's forthcoming opening brief, Appellant moves that the Court take judicial notice of, and permit Appellant to include in Volume 2 of the joint appendix, the Amended Complaint filed on July 12, 2023 in *Harold R. Berk v. Rothman Institute Orthopedic Foundation et al.*, No. 2:23-cv-01437-JFM (E.D. Pa.), including its exhibits, attached hereto as Exhibit 1.

Per their counsel, Appellees each oppose this motion.

LEGAL STANDARD

Federal Rule of Evidence 201 provides that a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "The court ... must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c); *see also United States v. Remoi*, 404 F.3d 789, 793 n.1 (3d Cir. 2005) ("Judicial notice may be taken at any stage of the proceeding, including on appeal, as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." (quotation marks omitted)).

ARGUMENT

The materials that Appellant seeks to include in the joint appendix—a pleading in another federal lawsuit and its exhibits—meet the requirements for judicial notice under Federal Rule 201. This Court "may take judicial notice of the contents of another Court's docket." *Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535, 537 n.1 (3d Cir. 2014). In particular, it is

well established that "appeals courts may take judicial notice of filings or developments in related proceedings which take place after the judgment appealed from." *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001); *see also id.* at 295-96 (taking judicial notice of "the existence and filing" of materials submitted in a separate action); *see also Pa. Dep't of Hum. Servs. v. United States*, 897 F.3d 497, 514 (3d Cir. 2018) ("A court may take judicial notice of an adjudicative fact if that fact is not subject to reasonable dispute."). Pursuant to these principles, the documents for which Appellant requests judicial notice—an amended pleading in a related action filed after the judgment appealed from, along with its exhibits—are properly subject to judicial notice. *See Werner*, 267 F.3d at 296 ("We can and will judicially notice the existence and filing of these [materials] under Fed. R. Evid. 201(b).")

CONCLUSION

For the foregoing reasons, Appellant requests that the Court take judicial notice of the documents described herein and permit Appellant to include them in Volume 2 of the joint appendix for this appeal.

Dated: August 4, 2023

Respectfully submitted,
s/ Samuel I. Ferenc

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Andrew T. Tutt
Samuel I. Ferenc
Minjae Kim
Katie Weng
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sam.ferenc@arnoldporter.com

Counsel for Plaintiff-Appellant Harold R. Berk

COMBINED CERTIFICATIONS

1. Pursuant to Local Rule 28.3(d), I certify that at least one of the attorneys whose names appear on this motion is a member of the bar of this Court.

2. I certify that the foregoing motion complies with Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 457 words. I further certify that this document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. I certify that on August 4, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

5. I certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Windows Security, Antivirus Version 1.393.2270.0 (last updated August 4, 2023), and according to that program the submissions are free of viruses.

Dated: August 4, 2023

s/ Samuel I. Ferenc
Samuel I. Ferenc

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Case No. 2.23-cv-01437-JFM

HAROLD R. BERK,

Plaintiff,

vs.

ROTHMAN INSTITUTE ORTHOPEDIC FOUNDATION, RECONSTRUCTIVE ORTHOPAEDIC ASSOCIATES II, LLC ROTHMAN ORTHO PA HOLDCO I, P.C. ROTHMAN ORTHO PA HOLDCO II, P.C. ROTHMAN ORTHO PA HOLDCO III, P.C. ROTHMAN ORTHO PA HOLDCO IV, P.C. ROTHMAN ORTHOPAEDIC SPECIALTY HOSPITAL, LP, ROTHMAN ORTHOPAEDIC SPECIALTY HOSPITAL, LLC ALEXANDER R. VACCARO, MD, DAVID I. PEDOWITZ, MD and STEVEN M. RAIKIN, MD,

Defendants.

AMENDED COMPLAINT

1. This is an action by Harold R. Berk, Pro Se, against his physicians and surgeons at the Rothman Institute in Philadelphia, Pennsylvania who refused to provide him with a Delaware Affidavit of Merit for his medical malpractice case against Wilson Choy, MD, Beebe Medical Center in Lewes, Delaware and Encompass Health Rehabilitation Hospital in Middletown, Delaware even though Plaintiff's orthopedic surgeon, Dr. Steven M. Raikin, the former

head of the foot and ankle practice at the Rothman Institute, stated to Plaintiff on or about January 24, 2023 that he had a good medical malpractice case.

2. As a result of Plaintiff's treating physicians and surgeons refusing to give Plaintiff a Delaware Affidavit of Merit, the District Court in *Berk v. Choy*, et al., No. 22-1506 (D. Del. April 4, 2023), dismissed the medical malpractice case.

3. Plaintiff has filed a Notice of Appeal on April 4, 2023 to the Third Circuit Court of Appeals from the District Court's dismissal, and Plaintiff's appeal has been docketed by the Clerk of the Third Circuit. A briefing schedule was ordered on July11, 2023.

4. In the event that the Third Circuit rules against Plaintiff's argument that recent decisions by Five Circuit Courts of Appeal that Rule 8 and other Rules of the FRCP prohibit use of Affidavits of Merit in a diversity action, as is *Berk v. Choy*, Plaintiff will have no recourse for the alleged medical malpractice, and this action against the defendants named should proceed due to defendants' breach of their fiduciary duty to their patient, the Plaintiff, to provide timely information, reports, evaluations and to willingly testify in Plaintiff's medical malpractice litigation. There are also Sherman Act claims for conspiracy in restraint of trade and commerce and for intentional deprivation of the opportunity to obtain legal recourse and remedies for the medical malpractice of third parties.

5. Plaintiff Harold R. Berk is a retired attorney who resides at 17000 SW Ambrose Way, Port St. Lucie, Florida 34986 and is a citizen of Florida and he together with his wife also own real property at 207 Samantha Drive, Lewes, Delaware where they

spend the summer months. Plaintiff practiced law for 51 years and retired as of July 1, 2022 by Order of the Supreme Court of Pennsylvania accepting his retirement application.

6. Defendant Rothman Institute Orthopaedic Foundation is a Pennsylvania non-profit corporation with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107. It employs orthopedic doctors to assist in its research and other activities.

7. Defendant Reconstructive Orthopaedic Associates II, LLC is a Pennsylvania limited liability company which trades as The Rothman Institute and also trades as Rothman Orthopaedics with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

8. Defendant Rothman Ortho PA Holdco I, P.C. is a Pennsylvania business corporation with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

9. Defendant Rothman Ortho PA Holdco II, P.C. is a Pennsylvania business corporation with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

10. Defendant Rothman Ortho PA Holdco III, P.C. is a Pennsylvania business corporation with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

11. Defendant Rothman Ortho PA Holdco IV, P.C. is a Pennsylvania business corporation with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

12. Defendant Rothman Orthopaedic Specialty Hospital, LP is a Pennsylvania limited partnership with offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107. Plaintiff was treated there on two occasions related to the injuries in question.

13. Defendant Rothman Orthopedic Specialty Hospital, LLC is a Pennsylvania limited liability company and is the general partner of Rothman Orthopaedic Specialty Hospital, LP, and it has offices located at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania,19107. Plaintiff was examined and treated at its offices off Street Road on two occasions related to the injury in question.

14. Defendant Rothman Institute Orthopaedic Foundation, Defendant Reconstructive Orthopaedic Associates II, LLC, Defendant Rothman Ortho PA Holdco I, P.C., Defendant Rothman Ortho PA Holdco II, P.C., Defendant Rothman Ortho PA Holdco III, P.C., Defendant Rothman Ortho PA Holdco IV, P.C., Defendant Rothman Orthopaedic Specialty Hospital, LP, and Defendant Rothman Orthopedic Specialty Hospital, LLC are collectively referred to hereafter as "Rothman." Rothman has a total of 180 orthopedic physicians and of those 24 specialize in foot and ankle orthopedic problems.

15. Defendant Alexander Vaccaro, M.D., M.B.A., and PhD. is the CEO of Rothman, and he maintains offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

16. Defendant David Pedowitz, M.D. is the head of the foot and ankle practice at Rothman, and he maintains an office at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania 19107.

17. Defendant Steven M. Raikin, M.D. is now retired but he was Plaintiff's orthopedic surgeon for two operations conducted at Jefferson University Hospital in 2020 and 2021 when he was the head of the foot and ankle practice at Rothman, and he resides at 221 Merion Road, Merion Station, Pennsylvania 19066.

18. This Court has jurisdiction over this matter under 28 U.S.C. §1332 as this is a matter between citizens of different states and the amount in controversy exceeds Seventy-Five Thousand Dollars not including fees and costs.

19. Venue is proper in this Court as the defendants are business entities, or non-profit corporations either incorporated or organized in Pennsylvania and they all have their principal offices at 925 Chestnut Street, 5th floor, Philadelphia, Pennsylvania. The individual physicians have offices in Philadelphia or, in the case of Dr. Raikin, reside in Merion Station, Pennsylvania.

FACTS

20. Plaintiff fell on August 20, 2020 and injured his left ankle. He was taken by ambulance to Beebe Medical Center, Inc. ("Beebe") from his house in Lewes, Delaware.

21. Initial X-Rays were taken and the radiologist and an orthopedic surgeon agreed that the X-ray showed:

> There is a mildly displaced fracture of the distal tibia involving the medial malleolus and posterior cortex. There is a mildly comminuted nondisplaced fracture of the distal fibula centered approximately 6 cm

> above the tibial plafond. There is mild widening at the ankle mortise, concerning for underlying ligamentous injury. The talar dome is smooth. Bone mineralization is within normal limits. No radiopaque foreign body in the soft tissues.
>
> Impression:
>
> 1. Mildly displaced fracture of the distal tibia as described.
> 2. Nondisplaced comminuted fracture of the distal fibula as described.

22. Plaintiff was taken to a room in the Emergency Department of Beebe, and the nurses there and staff decided to put a CAM boot on Plaintiff's leg despite the fact that Plaintiff had leg ulcers from his condition of venous insufficiency.

23. The Beebe staff had a difficult time putting the CAM boot on Plaintiff, and in doing so the Beebe staff twisted and turned Plaintiff's left leg which caused Plaintiff extreme pain and suffering which required the Beebe staff to administer hydromorphone to Plaintiff, a drug eight times more powerful than morphine according to federal reports.

24. Plaintiff cried out in extreme pain as the staff continued to manipulate the CAM boot, and as a result of their actions they severely aggravated the injury to Plaintiff's left leg by manipulating the recently fractured ankle in several directions.

25. After a half to an hour of torture, the staff decided Plaintiff could not tolerate the CAM boot and put on a splint instead.

26. Beebe took no X-rays of Plaintiff's leg after the aggravation of the injury in manipulating the CAM boot.

27. Wilson C. Choy, M.D. , the orthopedic surgeon who examined Plaintiff told him he needed to remain non-weight bearing on the left foot, but he did not need surgery.

28. The DOCTOR NOTES from Beebe's medical records stated:

> Discussed with Dr. Choy and imaging results reviewed by him. Recommends splint, non-wt. bearing on affected side. f/u in the office next week. After additional discussion with Dr. Choy, due to pt.' chronic lower extremity wounds requiring wound center evaluation and dressing changes q 1-2 days, will place in CAM boot instead of orthoglass splint. Noted that pt's spouse and myself with concerns regarding his ambulatory status prior to injury, now with ankle fx/NWB status and pt. with reported chronic difficulties on contralateral side. AM meds ordered, plan to have PT eval. Pt. to determine if safe to go home with resources vs. alternative dispo plan. (Pg.31 Beebe records).

29. Under a heading of RE-EVALUATION NOTES, under the heading of DOCTOR NOTES, it states:

> Plan is for physical therapy evaluation pending discharge plan. Patient still with pain and unable to complete physical therapy evaluation. Concern for possible cellulitis, patient started on Ancef. **Unable to tolerate CAM boot secondary to open wounds.** Fiberglass posterior splint placed in order to stabilize

> joint and avoid contact with open wounds with slight improvement of pain. (Pg. 31 Beebe records) (emphasis added).

30. No X-rays were ordered despite the extreme manipulation of the recently fractured leg and the severe pain that Plaintiff encountered with him yelling and crying in pain.

31. After a few days, Plaintiff was transferred to the Encompass Health Rehabilitation Hospital in Middletown, Delaware. Though plaintiff showed nurses and attendants and doctors the deformity of his leg, no one at Encompass took an Xray even though a regional hospital was across the street.

32. Encompass directed Plaintiff to lift himself using parallel bars which required he put his weight on both feet even though Dr. Choy ordered Plaintiff to remain non-weight bearing on his left leg for eight weeks.

33. After a few weeks at Encompass, Plaintiff was discharged to his home in Lewes.

34. After Plaintiff had a ramp installed in his house, he was able to leave in a wheelchair and visited Dr. Choy's office in Georgetown, Delaware on about September 20, 2020.

35. X-rays were taken of Plaintiff's left leg, the first X-rays of the leg since his initial admission Xray at Beebe on August 20, 2020.

36. Dr. Choy's assistant, Bryan Pepper, PA, told Plaintiff that his leg now had a very serious trimalleolar fracture with the leg bones going in three directions and that immediate surgery was needed, but due to Plaintiff's heart and breathing issues, Dr. Choy would not perform the surgery.

37. Plaintiff contacted Rothman and defendant Steven Raikin, M.D. of Rothman saw Plaintiff on September 23, 2020.

38. Dr. Raikin reviewed the X-ray films taken at Dr. Choy's office, and he was very upset with what he saw, as the Xray showed a major deformity of the left ankle.

39. Dr. Raikin's medical notes of September 23, 2020 state the following:

> Today's visit was a 60-minute plus face-to-face evaluation more than 50% of which discussed the complexity of his current problems combining his medical comorbidities and his unstable trimalleolar ankle fracture with tenting of the skin and a precarious open fracture configuration. Treatment options at this time include either repeat attempted manipulation and splinting or attempted casting with concerns regarding this becoming an open fracture, inability to maintain alignment, nonunion, deformity, and risk for ulcerative infection. The next alternative would be to go to the operating room and do an open reduction internal fixation with high risk for wound complications based on his skin quality around the ankle region. The final option would be to go to the operating room and do a more limited open reduction and definitive stabilization with a multiplane external fixator to hold the ankle in alignment while healing or at least long enough to allow medical optimization and preanesthetic clearance. I discussed these options with the patient and his wife.

> They have elected to proceed with the external fixation option which I think is the right management. This would depend on medical optimization and preanesthetic clearance. We did contact his cardiologist at Jefferson today Dr. Bravetti who has agreed to accept him into his service. Today. Prior to this I personally manipulated the fracture into an improved alignment to take the pressure off the medial malleolus and personally applied a well-padded posterior and U-splint to the region. Patient would like to proceed with the surgery. I discussed the surgical procedure, including but not exclusively related to the patients comorbidities, the post operative rehabilitation, the operative and non operative alternatives and the risks and benefits of these alternative options, as well as the expected prognosis of the above-mentioned procedure with the patient in detail. ... [risks] ... Additionally, the post operative pain protocol was discussed, with an emphasis on minimizing the use of narcotic medications. ... [patient understanding] ... In my medical opinion, the patient has an orthopedic problem that requires surgical intervention and that is now time sensitive.

40. Cleveland Clinic describes a trimalleolar fracture as follows:

> What is a trimalleolar fracture?
>
> Trimalleolar fractures happen when you break the lower leg sections that form your ankle joint and help you move your foot and

ankle. Trimalleolar fractures require surgery and extensive physical therapy. A trimalleolar fracture can have a long-term impact on your quality of life.

What happens when I have a trimalleolar fracture?

When you have a trimalleolar fracture, you've broken three bony sections at the end of your lower leg bones:

- Your tibia (shinbone). This is the larger bone in your lower leg. There's a bony knob that sticks out at the inside of your ankle. This is your medial malleolus. There's also a bony section at the back of your tibia. This is your posterior malleolus.
- Your fibula. This is the smaller bone in your lower leg. There's a bony knob that sticks out on the outside of your ankle. This is your lateral malleolus.

The bony sections, which are sometimes called the malleo complex, create a three-sided frame supporting the ligaments that keep your ankle stable and let you move your ankle and foot.

Is a trimalleolar fracture a serious injury?

A trimalleolar fracture is a serious injury that can affect your quality of life and cause long term problems:

- You'll need ankle surgery to repair your trimalleolar fracture.

- You'll be in a cast or a brace or brace while your ankle heals. It can take months to recover from a trimalleolar fracture. That means you won't be able to get around easily, drive, or do other everyday activities.
- You can damage the tendons and ligaments that support your broken bones, adding to the time it takes to recover.
- You might walk with a limp even after your fracture heals.
- You are likely to develop arthritis in your ankle.

What causes a trimalleolar fracture?

Trimalleolar fractures can have several causes:

- Motor vehicle accidents.s
- Falls.
- Playing sports.
- Tripping.
- Abruptly "rolling" or rotating your ankle.

41. A trimallelolar fracture is much more complicated and severe than the mildly displaced and fractured distal fibia and tibula identified in the initial admission Xray of August 20, 2020, and Dr. Raikin said it needed immediate surgery.

42. Plaintiff was immediately taken to Jefferson Hospital in Philadelphia and admitted on September 23, 2020.

43. After procedures and medications to reduce fluid in plaintiff's lungs and to obtain an opinion from Dr. Bravetti on suitability for surgery, Dr. Raikin performed the surgery, manipulating the bones of the ankle into better position and installing the external fixator as discussed.

44. Plaintiff was discharged to home about a week later.

45. Though necessary, the external fixator was very difficult and pain inducing. Plaintiff could not straighten his leg, and the large external rods and clamps made it difficult to lie in bed as it was very difficult to move plaintiff's leg with the external fixator attached.

46. The external fixator caused daily pain while lying in bed. When plaintiff's wife drove him places, he had to lift his leg off the floor of the car if he saw a bump ahead as the impact to a bump was transmitted by the external fixator into the bone causing pain and agony.

47. Plaintiff attended sessions at the Beebe wound management service to treat his leg ulcers caused by chronic venous insufficiency and to treat the left leg after surgery.

48. Plaintiff also had home wound care, physical and occupational therapy, but there was little plaintiff could do in the way of physical therapy while the external fixator was attached.

49. Though Dr. Raikin did not want plaintiff to take narcotic pain relievers, there was constant pain with the external fixator and plaintiff had to do the best he could with over the counter pain relievers.

50. After four months with the external fixator, plaintiff was readmitted to Jefferson Hospital in late January, 2021 to remove the external fixator, and Dr. Raikin did remove it at that time.

51. Plaintiff was then discharged from Jefferson after about a week and taken directly to Magee Rehabilitation Hospital in Philadelphia for physical and occupational therapy. Plaintiff was still non-weight bearing, and at first he was transferred from the bed to a wheelchair in a mechanical hoist device, but later he was trained in use of transfer boards to get from the bed to a wheelchair.

52. With the extensive and expert physical and occupational therapy at Magee, and after Dr. Raikin permitted him to be weight bearing in March, 2021, plaintiff was able to walk short steps using a walker. Plaintiff continued to gain strength at Magee.

53. Plaintiff was discharged from Magee on or about March 15, 2021, and he then commenced physical and occupational therapy at Elite Rehab in Rehoboth, Delaware. For the first months, plaintiff arrived at Elite in a wheelchair.

54. Elite Rehab also did expert physical and occupational therapy. Gradually, they improved his walking ability, his use of a walker and cane, and after about seven months of physical therapy at Elite, plaintiff was able to walk short distances using a cane.

55. Plaintiff has continued in need of physical therapy, and same has been provided by Cleveland Clinic and Premier Physical Therapy in Port St Lucie, Florida, and he has an appointment on July 13, 2023 at ATI Rehab in Lewes, Delaware.

56. Plaintiff still, as of April, 2023, has balance problems and weakness in his legs, and he must still use a cane for balance and mobilization.

57. During the summer of 2022, Plaintiff endeavored to contact Dr. Raikin for follow-up and to request he prepare an Affidavit of Merit for Plaintiff's malpractice claim against Dr. Choy, Beebe and Encompass.

58. In many phone calls to Dr. Raikin's office he was told the doctor was not available or that he was on leave or that they could not schedule him.'

59. Finally, in late August, 2022, one receptionist told me that Dr. Raikin had retired from the practice of medicine for medical reasons.

60. Plaintiff never received any notice from Rothman that Dr. Raikin had retired or the reasons for his early retirement at about age 59, and on later inquiry Plaintiff found out that Dr. Raikin retired in March, 2022.

61. Plaintiff then made inquiries and found that Dr. Pedowitz had taken over as head of the foot and ankle practice at Rothman, and he made an appointment with Dr. Pedowitz for follow-up and discussion of an Affidavit of Merit.

62. Plaintiff saw Dr. Pedowitz on August 29, 2022, and he pronounced Plaintiff's left leg well-healed, but he was very busy and there was not time to discuss the Affidavit of Merit.

63. Plaintiff wrote a letter to Dr. Pedowitz on November 4, 2022 outlining what happened before Dr. Raikin's intervention and requesting he review records to produce an Affidavit of Merit. Plaintiff again wrote Dr. Pedowitz on November 8, 2022

seeking an Affidavit of Merit, but Dr. Pedowitz did not respond to either letter. The November 4, 2022 letter to Dr. Pedowitz is attached as Exhibit A.

64. On December 6, 2022, Plaintiff wrote to Dr. Vaccarro, the CEO and President of Rothman and described the past medical malpractice by Dr. Choy, Beebe and Encompass and requesting his assistance in having some orthhopedic physician at Rothman review Plaintiff's medical records and issue an Affidavit of Merit. Plaintiff told Dr. Vaccaro that he had contacted his Administrative Assistant, Lisa Suzenski, but she told Plaintiff in an email that there was no one at Rothman who could or would review Plaintiff's medical records. This despite the fact that Rothman has 180 orthopedic physicians and 24 specialized in foot and ankle and operating under Dr. Pedowitz's leadership as head of the foot and ankle practice. Dr. Vaccaro never responded to the letter. The December 6, 2022 letter is attached as Exhibit B. Ma. Suzenski's email is attached as Exhibit C.

65. Plaintiff wrote several other letters in December 2022 and in January , 2023 to Drs. Vaccaro and Pedowitz stressing that he was under a rapidly approaching deadline to produce an Affidavit of Merit. Neither doctor responded to any of the letters, and in fact neither doctor responded to any of Plaintiff's further letters outlining the deadline and need for an Affidavit of Merit. See collection of letters to Drs. Vaccaro and Pedowitz attached as Exhibit D.

66. Ms. Suzenski, the Administrative Assistant to Dr. Vaccaro, advised Plaintiff that Rothman would no longer review medical records of their own patients if litigation against third party physicians or hospitals was contemplated.

67. Plaintiff paid for a search of records concerning Dr. Raikin, and he obtained a written report with Dr. Raikin's home address and cell phone number.

68. Plaintiff called Dr. Raikin on or about January 24, 2023 to discuss his situation and need for an Affidavit of Merit or a deposition of Dr. Raikin, but he refused to cooperate saying Plaintiff needed to go through channels at Rothman, even though he was retired, as he was probably bound by Rothman's policies due to a pension or profit sharing plan.

69. During that conversation on January 24, 2023, Dr. Raikin, who was familiar with the records and Plaintiff's history, as Plaintiff's Rothman surgeon, said to Plaintiff that he had a good medical malpractice case, but he could not or would not assist or put anything in writing due to Rothman's policies and procedures.

70. Plaintiff then called his former primary care doctor from Jefferson Hospital, who was now Medical Director for Bayview Hospital in Sussex County, Delaware, but he said there was no one at Bayview who could or would assist Plaintiff with an Affidavit of Merit.

71. Plaintiff then wrote on January 5, 2023 to Dr. Barry Davis, his orthopedic physician in Ft. Pierce, Florida who treated him for a fractured wrist when he had a syncope episode on December 16, 2021, but Dr. Davis' assistant called and said he does not review medical records or issue Affidavits of Merit. Letter to Dr. Davis attached as Exhibit E.

72. Plaintiff then contacted the Orthopedic Department of Cleveland Clinic in their Florida locations where he had been a patient, but they said

they did not review medical records for third party evaluations.

73. Plaintiff also applied to Rothman's Office in Orlando, Florida, but they cancelled the appointment saying they did not do reviews related to litigation.

74. United States doctors with the assistance of the American Medical Association have formed their own version of the Police Blue Wall by refusing to assist their own patients if litigation against third parties is contemplated.

75. Doctors and hospitals and insurance companies are behind the efforts in states to impose Affidavit of Merit requirements on filing of medical malpractice actions so they have a way of dismissing meritorious cases by virtue of the Blue Wall of doctors refusing to even assist their own patients with Affidavits of Merit.

76. Rothman is an avid participant in this Doctor Blue Wall by adamantly refusing to assist their own patients with an Affidavit of Merit even when their treating surgeon says to the Plaintiff that he has a good case, as did Dr. Raikin.

77. Courts should not permit doctors to create this Blue Wall of Non- Cooperation with their own patients as the effect is to inhibit and prevent meritorious medical malpractice cases from being filed or getting past a Motion to Dismiss, even if meritorious.

78. Rothman's actions and inactions in refusing to allow Dr. Raikin to state his medical opinion in writing in an Affidavit of Merit, when Dr. Raikin said to Plaintiff on January 24, 2023 that he had a good medical malpractice case and when Dr. Raikin's

medical notes of September 23, 2020 indicate he was presented with a very serious fracture, now a month old, which had significantly deteriorated from that described in the admission Xray at Beebe and which he said required immediate surgery, Rothman is deliberately interfering with Plaintiff's attempt to receive a judicial award for his injuries.

79. Rothman's refusal to allow Dr. Raikin to state his medical opinion in an Affidavit of Merit violates the Rules and Ethical guidelines of both the American Medical Association and the American College of Surgeons.

80. The American Medical Association's Code of Medical Ethics 9.7.1 states:

> Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice. Exhibit F.

81. The American College of Surgeons, in their April 1, 2011 "Statement on the Physician Acting as an Expert Witness," states that failure to comply with these Rules may constitute a violation of the Bylaws of the American College of Surgeons, and the Rules require:

> Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expected to be impartial and are not to adopt a position as an advocate or partisan in the legal proceedings. Exhibit G

82. Rothman's policies and procedures preventing their surgeons from giving reports, Affidavits of Merit or testifying in third party litigation violates the rules and ethical canons of the AMA and the ACS.

83. Plaintiff's injuries from the actions of Beebe and Encompass cause pain and suffering and balance problems to this date for Plaintiff who is still undergoing physician ordered physical therapy, three years after the Beebe aggravated injury, all as predicted by Cleveland Clinic in their description of the nature and effect of a trimalleolar fracture.

84. The actions and inactions of Rothman in categorically refusing to assist their own patients if litigation is contemplated against third parties is the epitome of their Doctor Blue Wall designed to suppress meritorious medical malpractice cases and deprive injured patients of legal recourse for their injuries and pain and suffering.

FIRST CAUSE OF ACTION- BREACH OF FIDUCIARY DUTY

85. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 84 above as if set forth herein.

86. Doctors owe a fiduciary duty to their patients to provide records, needed documents and testify at trial in actions by their own patients for medical malpractice against third parties. *Alexander v. Knight,* 25 D & C 2d 649 (Ct. Common Pleas Phila. 1961), affirmed 197 Pa. Super 79, 177 A.2d 162 (1962), and quoted and followed in *Manion v. N.P.W. Medical Center of N.E. PA,* 676 F. Supp. 585 (M.D. Pa. 1987).

87. Included in the doctors' fiduciary duty to their own patients is to prepare needed documents for court filings by their own patients such as Affidavits of Merit or Certificates of Merit as required by statute as a pre-condition for filing a medical malpractice action against third parties.

88. Rothman is part of this Doctor Blue Wall preventing their own patients with meritorious medical malpractice claims to proceed to trial by refusing to review records and prepare needed Affidavits of Merit in order to suppress their own patients medical malpractice claims against third parties.

89. Rothman has 180 orthopedic physicians and 24 specializing in foot and ankle injuries, and there were personnel available to review Plaintiff's medical records and issue an Affidavit of Merit agreeing with Dr. Raikin's assessment of the merit in Plaintiff's case.

90. Plaintiff told Dr. Vaccaro's administrative assistant that he was willing to pay Rothman's standard rate for reviewing records and preparing a report and Affidavit of Merit.

91. Doctors Vaccaro, Pedowitz and Raikin implement, promote and enforce the Rothman non-cooperation rule with patients' litigation needs by refusing to provide Affidavits of Merit no matter how meritorious the case, and they thereby intentionally deny their own patients' legal recourse and remedies.

92. If Rothman cooperated with Plaintiff and provided an Affidavit of Merit, Plaintiff would have been successful in his medical malpractice case against Dr. Choy, Beebe and Encompass as a jury

would likely agree with Dr. Raikin's assessment of the merit of Plaintiff's claims.

93. Instead as a result of Rothman and Drs. Vaccaro, Pedowitz and Raikin's actions and refusals to act, Plaintiff's case of *Berk v. Choy*, No 22-1506 (D. Del. April 4, 2023) was dismissed due to the lack of an Affidavit of Merit.

94. The actions and failures to act by Rothman and the individual physicians violate their fiduciary duty to Plaintiff by refusing to provide an Affidavit of Merit consistent with Dr. Raikin's expert medical opinion, based on his extensive knowledge of Plaintiff's condition and the condition in which he found him on September 23, 2020 after the refusal of Dr. Choy to perform the needed surgery on the trimalleolar fracture.

95. The fiduciary duty doctors owe their patients includes the obligation to disclose adverse conditions, and that duty of disclosure is part of the obligation of physicians to report the actual condition of the patient and any deficiencies in prior medical providers permitting a mild fracture to be converted into an untreated serious trimalleolar fracture.

WHEREFORE Plaintiff prays that Judgment be entered in his favor for compensatory and punitive damages in an amount in excess of Seventy-Thousand Dollars ($75,000) exclusive of interest and costs.

SECOND CAUSE OF ACTION CONSPIRACY IN RESTRAINT OF TRADE: VIOLATION OF SHERMAN ACT AND CLAYTON ACT

96. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 95 above as if set forth herein.

97. Rothman and Drs. Vaccaro, Pedowitz and Raikin have entered into a conspiracy in restraint of trade by agreeing together and with other doctors in East Coast states to refuse to issue court required Affidavits of Merit or Certificates of Merit in order to suppress meritorious insurance claims against doctors and hospitals that are third parties.

98. Defendants Rothman, Vaccaro, Pedowitz and Raikin have entered into a conspiracy in restraint of trade violating the Sherman Act, 15 U.S.C. §§ 1-38, as a "contract, combination or conspiracy in restraint of trade" by agreeing together to not cooperate with their own patients' on litigation needs and thereby effectively denying their patients recourse against third party doctors and hospitals thereby reducing the amounts paid by insurance companies in settlements and judgments and reducing the defendants' medical malpractice insurance costs.

99. The conspiracy in restraint of trade has two components: (1) doctors and insurance companies, in order to reduce medical malpractice awards and medical malpractice premiums, have induced state legislatures to require Affidavits or Certificates of Merit as a condition of filing a medical malpractice case.

100. On its own, such requirements appear reasonable to deter frivolous medical malpractice claims. But the second component of the conspiracy among doctors, as experienced by Plaintiff, is the refusal by doctors to provide Affidavits or Certificates of Merit even in meritorious cases.

101. Plaintiff experienced this refusal to provide Affidavits of Merit from not only Rothman but also Health Corporation of America, The Cleveland Clinic,

and Bayshore Medical, all of whom by their conduct are part of the conspiracy.

102. The purpose of this conspiracy in restraint of trade is to prevent meritorious medical malpractice claims from being filed which will prevent even meritorious claims against doctors which lowers malpractice insurers costs and thereby reduces medical malpractice insurance premiums to the benefit of doctors.

103. A purpose of the Sherman Act and the Clayton Act is to protect consumers from the effects of monopolies, and here the conspiracy among doctors and insurers is injurious to patient-consumers by depriving them of compensation for malpractice induced injuries.

104. Plaintiff is a consumer who has been injured by the lack of compensation for his physical injuries resulting from defendants' conspiracy in restraint of trade.

105. Due to defendants' implementation of their conspiracy in restraint of trade which deprived Plaintiff of the opportunity to pursue his medical malpractice claim, defendants are liable for treble damages and attorney fees under 15 U.S.C. §15(a).

106. Plaintiff's claims in the now dismissed medical malpractice action are approximately $1,400,000 for Medicare approved medical expenses and pain and suffering, so the damages due under the Sherman-Clayton Act violation are three times that amount or $4,200,000 plus costs and attorney fees.

WHEREFORE, Plaintiff prays that the Court enter Judgment for an amount in excess of $75,000 plus

interest and costs and attorney fees for intentional violation of the Sherman Act and Clayton Act.

THIRD CAUSE OF ACTION INTENTIONAL DEPRIVATION OF LEGAL RECOURSE BY WITHHOLDING NECESSARY AFFIDAVITS

107. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 106 above as if set forth herein.

108. Defendants intentionally and deliberately deprived Plaintiff of the opportunity to litigate his medical malpractice claims against Dr. Choy, Beebe and Encompass by refusing to have any of their 180 orthopedic doctors review Plaintiff's medical records for the purpose of issuing an Affidavit of Merit as required by Delaware law affirming the oral opinion of Dr. Raikin that Plaintiff had a good medical malpractice claim.

109. Defendants had no right or privilege to so deny Plaintiff the opportunity to litigate his medical malpractice claims against third parties.

110. If Plaintiff had been able to try his medical malpractice case, he would likely be successful as the jury would agree with the opinion of Dr. Raikin that there was medical negligence in plaintiff's examination and treatment by Dr. Choy and by Beebe and Encompass which was below the standard of care appropriate for Plaintiff's medical condition.

111. As a consequence of defendants' intentional interference with Plaintiff's ability to pursue his medical malpractice action, Plaintiff has been deprived of compensation for his medical injuries and the pain and suffering accompanying the injuries.

112. Defendants' refusal to assist their patient with a necessary Affidavit of Merit was malicious, unwarranted, hostile to the rights of their patient, and Plaintiff is entitled to both compensatory and punitive damages.

WHEREFORE, Plaintiff prays that Judgment be entered in his favor and against defendants in an amount in excess of Seventy-Five Thousand Dollars exclusive of interest and cost.

/s/ Harold R. Berk
Harold R. Berk, Plaintiff, Pro Se.
17000 SW Ambrose Way
Port St. Lucie, Florida 34986
215-896-2882
haroldberk@gmail.com

CERTIFICATE OF SERVICE

Harold R. Berk, Plaintiff Pro Se, hereby certifies that he caused a copy of the foregoing Amended Complaint to be served on counsel for defendants using the Court's ECF/CM system this July 12, 2023.

Harold R. Berk, Pro Se

EXHIBIT A

HAROLD R. BERK
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882 mobile
haroldberk@mail.com

November 4, 2022

VIA FAX 215-503-0568 or 267-479-1321

David I. Pedowitz, M.D.
Rothman Institute
925 Chestnut Street, 5th floor
Philadelphia, PA 19107

Dear Dr. Pedowitz:

I saw you on August 29, 2022 as follow-up to my ankle surgery performed by Dr. Steven Raikin in September 2021.

I am writing to you requesting that you review some of the medical records concerning my injury which occurred on August 20, 2020 for the purpose of providing me your opinion on whether the examination and treatment I had prior to seeing Dr. Raikin was not in compliance with the applicable standard of care and constituted negligence.

I will certainly pay you for your time spent evaluating my case and issuing a letter opinion.

I was taken by fire ambulance to the Beebe Hospital in Lewes, Delaware after falling out of bed. I was examined there, Xrays were taken, and Dr. Wilson Choy, an orthopedic surgeon reviewed my situation. He saw me at Midnight after my admission and told me that I had a mild fracture of the tibia and fibula but that I did not need surgery. He said

my leg would be put in a splint, and he expected it to be healed in about eight weeks. He did not explain why surgery was not needed.

The Xray report in the Beebe medical records states that on admission I had a "mildly displaced fracture of the distal tibia" and a "mildly comminuted nondisplaced fracture of the distal fibula." A splint was placed on my left leg.

After four days at Beebe, I was discharged and transferred to the Encompass Rehabilitation facility in Middletown, Delaware. At Encompass they had me doing physical therapy including standing with parallel bars and other activities requiring I stand on my legs. No)(rays were taken at Encompass.

After discharge from Encompass I went to Dr Choy's office where an Xray was taken, and the physician's assistant said the bones were not healing properly and were displaced and going in three directions. He contacted Dr. Choy on the phone, and he told me I now needed surgery, but Dr. Choy would not do it as my condition with heart issues was too complicated.

I made an appointment with Dr. Raikin, and he was quite astounded by my condition in light of the prior examination and diagnosis at Beebe. Dr. Raikin reviewed my Xrays and said I now have "an unstable trimalleolar ankle fracture with tenting of the skin and a precariously open fracture configuration." He went through various options and strongly recommended immediate surgery and use of an external fixator, to which I agreed. He had me go directly to Jefferson Hospital where he performed surgery a few days later and installed the external fixator.

Dr. Raikin did follow-up and after four months he removed the external fixator in January, 2021, but I

was kept non-weight bearing. I was discharged after a week or so and was admitted to Magee Rehabilitation Hospital. I was at Magee from the end of January to about March 15, 2021. They did a fantastic job getting me able to transfer and ultimately to walk with a walker after Dr. Raikin said I was then able to do so, but that was about six weeks after my admission.

Upon discharge from Magee, I was in a wheelchair and was required to remain in bed with my leg elevated above my heart. I then had physical and occupational rehabilitation at Elite Rehab in Rehoboth, Delaware, and I was able to walk with a cane after several months there of rehab three days a week.

I contend that Dr. Choy, Beebe and Encompass were all negligent in my examination and treatment resulting in a major misalignment of bones and improper healing resulting in the need for immediate surgery. Dr. Choy had said I did not need surgery, prescribed a splint and he and Beebe concluded I was able to undergo rehab at Encompass. But the severe deterioration in the leg was, in my view, caused by not properly treating the fracture, not undertaking surgery after the injury and having me engage in physical therapy with just a splint on my leg.

A physician is charged with not causing harm, but Dr. Choy, Beebe and Encompass did just that by not poperly treating my injury and allowing the fracture to become far worse and unstable.

I understand that Dr. Raikin had a lung transplant and has retired frompractice but I was told he does do some consultations.

I am attaching a few medical records for your review. Please let me know if you are willing to do a review and issue a writen opinion.

Thank you for your attention.

We are not at our house in Florida.

Sincerely,

/s/ Harold R Berk
Harold R. Berk

EXHIBIT B

HAROLD R. BERK
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882 mobile
haroldberk@mail.com
haroldrberk.substack.com

December 6, 2022

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

Dear Dr. Vaccarro:

In August, 2020 I suffered a left ankle fracture and was seen by medical personnel at Beebe Hospital in Lewes, Delaware. XRays on admission stated I had a mild fracture of the tibia and fibula. Dr. Wilson Choy ordered no surgery and assigned me for discharge to Encompass Rehab Hospital in Middletown, DE.

After discharge from Encompass and Xray examination a month later at Dr. Choy's office in Georgetown, DE, I was told I now had a very serious trimalleolar fracture that required immediate surgery. The initial fracture was significantly aggravated by staff in the ER at Beebe twisting and contorting my leg to put on a CAM boot causing extreme pain requiring multiple doses of hydromorphone.

I then saw Dr. Raikin at Rothman who ordered immediate surgery and installed an external fixator

for four months. He did a fine job throughout. I now know that Dr. Raikin recently retired for medical reasons.

I contacted Dr. Pedowitz and Lisa Suzenski seeking any ankle and foot doctor at Rothman to review the medical records at Beebe and Rothman to give me a medical opinion on whether the actions of the Beebe ER staff in twisting and turning my fractured ankle causing aggravating and serious injuries were not consistent with the applicable standard of care.

Ms. Suzenski advised me yesterday that there was no one among the 40 or so ankle and foot doctors at various Rothman offices willing to look at the medical records. I had agreed to pay a fee to Rothman for doing so.

I have filed litigation against Beebe Hospital, Dr. Choy and Encompass Rehab in federal court In Wilmington. By order of Judge Andrew, he granted me an extension up to January 23, 2023 to file a medical opinion on the treatment at Beebe etc.

I am writing to you to seek your assistance if you can use your persuasion to convince some ankle and foot doctor to examine the Beebe records and Dr. Raikin's records in order to give me a medical opinion.

My wife Joan McClure had knee and hip surgery performed by Dr. Rothman, and we saw him a week before he died. Besides Dr. Raikin, I have been examined by Dr. Surena Namdari for a torn rotator cuff.

I should note I reviewed your curriculum vitae, and it is extraordinarily impressive.

Respectfully,
/s/ Harold R Berk
Harold R Berk

Cc: Lisa Suzenski

EXHIBIT C

Re: Rothman Foot and Ankle Physician to review Beebe and Choy medical records

1 message

Harold Berk <haroldberk@gmail.com>

Mon, Dec 5, 2022 at 12:05 PM

To Lisa Suzenski <Lisa.Suzenski@rothmanortho.com>

Ms. Suzenski:

I am really disappointed that so many doctors care nothing about the standards by which medical care is delivered. I am particularly disappointed that Rothman with offices in four states cannot find one doctor to review basic Xray records to see the dramatic difference between initial admission Xrays and Xrays after a month of hospitalization and rehab. I know doctors are more concerned about money than practicing medicine, at least today, and it is a shame that no one wants to stand up for standards of care for patients.

I have been an attorney for 51 years, and I did review situations where another lawyer did not handle a matter well. I guess doctors are too dollar driven to care. Dr. Rothman would not be pleased.

Harold R Berk
17000 SW Ambrose Way
Port St. Lucie, FL 34986
215-896-2882
haroldberk@gmail.com

207 Samantha Drive
Lewes, DE 19958

haroldrberk.substack.com
Twitter: @haroldrberk

On Mon, Dec 5, 2022 at 10:54 AM Lisa Suzenski <Lisa.Suzenski@rothmanortho.com> wrote:

Hi Mr. Berk,

I am not having any luck here. I have not gotten one physician that is able to do this for you. I am so sorry.

Lisa

Lisa Suzenski
Administrative Assistant for:

Rothman Orthopaedic Institute
400 Enterprise Drive
Limerick, Pennsylvania 19468

EXHIBIT D

HAROLD R. BERK
17000 SW Ambrose Way
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December 16, 2022

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

Dear Dr. Vaccarro:

With reference to my letter to you of December 6, 2022, your assistant contacted me today and said that the Rothman Institute does not engage in medical testimony. It was unclear if Rothman will do so for patients or only for doctors in defense of claims against them.

If that is the operating principle of the Rothman Institute that your physicians do not testify in litigation unless served with a subpoena for compulsory attendance, then you are violating AMA Code of Medical Ethics 9.7.1 which states in its opening paragraph that:

"Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience,

physicians have an obligation to assist in the administration of justice."

In my case, I was examined and treated by Dr. Steven Raikin, and his testimony is important to confirm his assessment of the seriousness of my condition on initial examination which resulted in him ordering emergency surgery.

I cannot present my case without Dr. Raikin's testimony or that of another Rothman physician since the Rothman medical records will be a crucial part of the case, and the assessment of those records is vital to establish the dramatic negative change in)(rays from my initial hospital admission until a subsequent Xray was taken a month later. Rothman is not an independent evaluator, you were my doctors at a critical time, and Dr. Raikin and others examined me and performed surgery and follow-up.

I asked Ms. Suzenski to provide me Dr. Raikin's address so I could contact him, but she has failed to do so, probably on your orders. If so, that means that Rothman Institute is interfering with my case and preventing me from developing and presenting crucial evidence.

I suggest you reconsider your position so as not to interfere with my litigation against Dr. Choy, Beebe Hospital and Encompass Rehabilitation Hospital in Middletown, Delaware. I hope you will do so.

I am under a time deadline to present an initial expert opinion by January 23, 2023, so I would hope I could get your cooperation.

Respectfully,
/s/ Harold R Berk
Harold R Berk

cc: Lisa Suzenski

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December 19, 2022

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia. PA 19107

Dear Dr. Vaccarro:

I sent you letters of December 6 and 16, 2022 regarding my need for a physician of the Rothman Institute to review medical records of Rothman and those of Beebe Hospital and Encompass Rehab of Middletown, DE in connection with malpractice litigation I have filed against them and Dr. Wilson Choy, the orthopedist who said I had a mild fracture and did not need surgery. You have not responded.

As you know Dr. Rainkin was my surgeon, but he retired for medical reasons. I received no notice he had retired from Rothman even though he was due to perform a one-year follow-up examination. I have asked Rothman to provide Dr. Rainkin's current location, so I could contact him, but again no response from Rothman.

Judge Andrews in the federal court in Wilmington has granted me an extension until January 23, 2023 to file an expert medical report.

Unless we can resolve these issues by tomorrow, Tuesday, December 20, 2022, I will do the following: (1) I will initiate litigation against Rothman for intentionally interfering with my ability to pursue the litigation, (2) I will file a report-complaint with the American Medical Association that Rothman is not following the AMA Code of Medical Ethics, specifically 9.7.1, and (3) I will publish an article on my Substack newsletter describing how Rothman is not following the AMA Code of Medical Ethics and interfering with their patients' pursuit of malpractice litigation against other medical providers.

Ms. Suzenski initially said there would be a fee for a medical report, and I agreed to pay same. But your associate said to me on Friday, that Rothman never offers testimony or opinions in litigation. One or both of those representations are obviously false. In the meantime, I have lost time to secure an expert.

I hope that none of that will be necessary, but the lack of any cooperation by Rothman, my doctors, leaves me no choice. Please consult a Rothman lawyer.

Sincerely,
/s/ Harold R Berk
Harold R Berk

cc: Lisa Suzenski via email

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December 20, 2022

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

Rothman Orthopaedic Specialty Hospital, LP
Rothman Orthopaedic Specialty Hospital, LLC,
General Partner
925 Chestnut Street, 5th floor
Philadelphia, PA 19107

Legal Department
Rothman Institute

Dear Dr. Vaccarro and the Partners of Rothman Orthopaedic Specialty Hospital, LP and the Managing Member of Rothman Orthopaedic Speciatly Hospital, LLC:

I have not heard from anyone at Rothman, be it a doctor or lawyer.

So, I have checked with the Pennsylvania Secretary of State for your business organization in anticipation of litigation. I can file a Complaint electronically, and I will do so if we cannot resolve what should be a simple matter.

Sincerely,

/s/ Harold R Berk
Harold R Berk

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December 22, 2022

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

Dear Dr. Vaccarro:

I am almost finished with my Newsletter which will be posted on the Substack System on how doctors have avoided testifying in medical malpractice cases while other professions are bound to testify and follow rules binding on lawyers, police, the military and others. But doctors have paid lobbyists to prevent adoption of legally binding rules.

But I am here sharing with you the "Statement on the Physician Acting as an Expert Witness" issued by the American College of Surgeons. Rothman Orthopedics is in violation of the ACS Statement even though I assume that most of your surgeons are members.

Of course, Rothman is featured in my Newsletter to be published shortly.

Sincerely,
/s/ Harold R Berk
Harold R Berk

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March 9, 2023

VIA FAX 267-479-1321

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

David I. Pedowitz, M.D.
Rothman Institute
925 Chestnut Street, 5th floor
Philadelphia, PA 19107

Steven M. Raikin, M.D.
221 Merion Road
Merion Station, PA 19066

RE: Berk v. Choy, et al. No. 22-1506
(USDCT Delaware)

Dear Drs. Vaccarro, Pedowitz and Rankin:

Due to the lack of any cooperation by the Rothman Institute and Rothman Orthopedics in not allowing a Rothman doctor to review my medical records, after my surgeon, Dr. Steven Rainkin, had to retire for medical reasons, the Court has decided to dismiss my malpractice case against Dr. Wilson Choy, Beebe Medical Center, Inc. and Encompass Health Rehab Hospital of Middletown, De. due to the absence of a

timely filed Affidavit of Merit as required by Delaware Law. A copy of the Judge's Order of March 9, 2023 is enclosed.

I did contact several other doctors in Delaware and Florida, but you guys have created a blue wall worse than that of police departments to protect your own and insulate doctors in general, no matter how poor their practice, from accountability. Even the AMA modified its rules to remove an obligation on doctors to testify for their patients.

So, my case is dismissed because you would not provide an Affidavit of Merit even though Dr. Raikin told me I had a good case.

But that is not the end of the ball game. You have collectively deprived me of the opportunity to litigate my legitimate claims, and therefore you have deprived me of my legal rights. You have committed an intentional interference with my legal rights for which you all are responsible in damages, personally, as is the Rothman Institute and Rothman Orthopedics.

Please refer this to your medical malpractice carrier and your D&O carrier.

If a settlement cannot be reached, I will sue all of you in federal court based on diversity jurisdiction.

Sincerely,
/s/ Harold R Berk
Harold R Berk

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March 10, 2023

VIA FAX 267-479-1321 and Email to Vaccaro and Pedowitz

Alexander R. Vaccaro, M.D., PhD., M.B.A.
President
Rothman Institute
925 Chestnut Street
5th floor
Philadelphia, PA 19107

David I. Pedowitz, M.D.
Rothman Institute
925 Chestnut Street, 5th floor
Philadelphia, PA 19107

Steven M. Raikin, M.D.
221 Merion Road
Merion Station, PA 19066

RE: Berk v. Choy, et al. No. 22-1506
(USDCT Delaware)

Dear Drs. Vaccarro, Pedowitz and Raikin:

Please let me know by no later than March 15, 2023 whether we can settle this matter. Please identify your legal counsel.

If you do not respond or demonstrate willingness to negotiate, I will file litigation against you on or after March 17, 2023 in the federal court in Philadelphia for damages. The litigation will be against each of

you personally and against Rothman Institute and Rothman Orthopedics.

I had suggested you allowing one of your junior doctors in Orlando to review my records to issue the affidavit of merit, where doctor Raikin said I had a good case, but that was not of interest to you as you rather see my case against Delaware doctors and institutions be dismissed rather than assist your patient.

Sincerely,
/s/ Harold R Berk
Harold R Berk

EXHIBIT E

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January 5, 2023

VIA FAX
772-4654087

Barry C. Davis, MD
HCA Florida Fort Pierce Orthopedics
2402 Frig Boulevard, Suite 102
Fort Pierce, FL 34950

Medical Review of Treatment in Lewes, DE

Dear Dr. Davis:

You examined and treated me after my wrist fracture from a syncope episode in December, 2021.

I would like to retain you for a fee to review some medical records regarding my left ankle fracture in August, 2020 in Lewes, Delaware. I need a short medical opinion about the quality of care given by Beebe Medical Center, Wilson Choy, MD, an orthopedic surgeon, and Encompass Health Rehabilitation Hospital in Middletown, Delaware.

The orthopedic surgeon who ultimately operated on me had to retire for medical reasons and is no longer practicing medicine.

I am not requesting you to testify on this case but only to give me a written medical opinion.

In sum, I fractured my left ankle falling out of bed on August 20, 2020 and was taken by ambulance to Beebe Hospital in Lewes, DE. The Xray report said I had a minor facture of the tibia and fibula. Dr. Choy said surgery was unnecessary and just stay non-weight bearing for 8 weeks. But nurses in the ER decided to manipulate my leg to put on a Boot, and they twisted and turned it causing intense pain for which they gave me hydromorphone. They determined I could not tolerate the boot but by their manipulation they caused additional aggravation of the fracture that happened that morning. No Xrays were taken after the initial admission Xray. Dr. Choy did not examine the records of what happened in the ER with the leg manipulation. I was then sent to Encompass Rehab in Middletown, DE, and while there they had me stand using parallel bars despite Dr. Choy's no weight bearing order, and a nurse observed deformation of my leg, but no Xrays were taken and the doctor there did not follow-up and examine.

After I was discharged from Encompass, I went to the offices of Dr. Choy, and his staff took an Xray which now showed a major deformation of the ankle. I then went to Dr. Steven Raikin of the Rothman Institute in Philadelphia, and he had me undergo emergency surgery, and he installed an external fixator which was kept on for four months due to the severity of the fracture and instability.

Dr. Raikin wrote the following in his notes:

> Today's visit was a 60-minute plus face-to-face evaluation more than 50% of which discussed the complexity of his current problems combining his medical comorbidities and his unstable trimalleolar ankle

> fracture with tenting of the skin and a precarious open fracture configuration. Treatment options at this time include either repeat attempted manipulation and splinting or attempted casting with concerns regarding this becoming an open fracture, inability to maintain alignment, nonunion, deformity, and risk for ulcerative infection. The next alternative would be to go to the operating room and do an open reduction internal fixation with high risk for wound complications based on his skin quality around the ankle region. The final option would be to go to the operating room and do a more limited open reduction and definitive stabilization with a multiplane external fixator to hold the ankle in alignment while healing or at least long enough to allow medical optimization and preanesthetic clearance. I discussed these options with the patient and his wife. They have elected to proceed with the external fixation option which I think is the right management.

I filed a medical malpractice suit against Dr. Choy, Beebe Medical Center and Encompass Rehab in the federal court in Wilmington, Delaware. I am now seeking a medical opinion from you as Dr. Raikin had to retire due to his own serious medical problems.

I hope you are willing to review the medical records and give me an opinion whether they followed the applicable standard of care.

I am willing to pay you a fee of $3,000 to review the records and write an opinion. Let me know if that would be satisfactory.

I need to file the medical opinion under seal in court by January 23, 2023.

Sincerely,
/s/ Harold R Berk
Harold R Berk

EXHIBIT F

AMA *Code of Medical Ethics*

9.7.1 Medical Testimony

Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

Whenever physicians serve as witnesses they must

(a) Accurately represent their qualifications.

(b) Testify honestly.

(c) Not allow their testimony to be influenced by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

Physicians who testify as fact witnesses in legal claims involving a patient they have treated must hold the patient's medical interests paramount by:

(d) Protecting the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

(e) Delivering honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case.

(f) Declining to testify if the matters could adversely affect their patients' medical interests unless the patient, consents or unless ordered to do so by legally constituted authority.

(g) Considering transferring the care of the patient to another physician if the legal proceedings result in placing the patient and the physician in adversarial positions.

Physicians who testify as expert witnesses must:

(h) Testify only in areas in which they have appropriate training and recent, substantive experience and knowledge.

(i) Evaluate cases objectively and provide an independent opinion.

(j) Ensure that their testimony:

(i) reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field;

(ii) appropriately characterizes the theory on which testimony is based if the theory is not widely accepted in the profession;

(iii) considers standards that prevailed at the time the event under review occurred when testifying about a standard of care.

Organized medicine, including state and specialty societies and medical licensing boards, has a responsibility to maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate.

AMA Principles of Medical Ethics: II,IV,V,VII

EXHIBIT G

ACS/American College of Surgeons

STATEMENTS

Statement on the Physician Acting as an Expert Witness

April 1, 2011

This statement was originally published in the June 2000 issue of the Bulletin. This revised statement incorporates revisions recommended by the *College's Central Judiciary Committee and was approved by the Board of Regents at its February 2011 meeting.*

Physicians understand that they have an obligation to testify in court as expert witnesses on behalf of the plaintiff or defendant as appropriate. The physician who acts as an expert witness is one of the most important figures in malpractice litigation. In response to the need to define the recommended qualifications for the physician expert witness and the guidelines for his or her behavior, the Patient Safety and Professional Liability Committee of the American College of Surgeons has issued the following statement.

Failure to comply with either the recommended qualifications for the physician who acts as an expert witness, or with the recommended guidelines for behavior of the physician acting as an expert witness, may constitute a violation of one or more of the *Bylaws* of the American College of Surgeons.

Recommended qualifications for the physician who acts as an expert witness:

- The physician expert witness must have had a current, valid, and unrestricted state license to practice medicine at the time of the alleged occurrence.

- The physician expert witness should have *been* a diplomate of a specialty board recognized by the American Board of Medical Specialties at the time of the alleged occurrence and should be qualified by experience or demonstrated competence in the subject of the case.
- The specialty of the physician expert witness should be appropriate to the subject matter in the case.
- The physician expert witness who provides testimony for a plaintiff or a defendant in a case involving a specific surgical procedure (or procedures) should have held, at the time of the alleged occurrence, privileges to perform those same or similar procedures in a hospital accredited by The Joint Commission or the American Osteopathic Association.
- The physician expert witness should be familiar with the standard of care provided at the time of the alleged occurrence and should have been actively involved in the clinical practice of the specialty or the subject matter of the case at the time of the alleged occurrence.
- The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter of the case.
- The physician expert witness should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert witness should be willing to disclose the amount of fees or compensation obtained for

such activities and the total number of times he or she has testified for the plaintiff or defendant.

Recommended guidelines for behavior of the physician acting as an expert witness

- Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expected to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings.
- The physician expert witness should review all the relevant medical information in the case and testis to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness and honesty.
- The physician expert witness should be prepared to distinguish between actual negligence (sub-standard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).
- The physician expert witness should review the standards of practice prevailing at the time and under the circumstances of the alleged occurrence.
- The physician expert witness should be prepared to state the basis of his or her testimony or opinion and whether it is based on personal experience, specific clinical references, evidence-

based guidelines, or a generally accepted opinion in the specialty. The physician expert witness should be prepared to discuss important alternate methods and views.

- Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and court appearance. It is unethical for a physician expert witness to link compensation to the outcome of a case.
- The physician expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records and subject to independent peer reviews. Moreover, the physician expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review if requested by his or her professional organization. The physician expert witness should be aware that failure to provide truthful testimony exposes the physician expert witness to criminal prosecution for perjury, civll suits for negligence, and revocation or suspension of his or her professional license.

Reprinted from Bulletin of the American College of Surgeons Vol.96, No. 4, April 2011

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BCO-110
No. 23-1620
(D. Del. No. 1-22-cv-01506)

HAROLD R. BERK,

Appellant

v.

WILSON C. CHOY, MD; BEEBE MEDICIAL CENTER INC.; ENCOMPASS HEALTH REHABILITATION HOSPITAL AND MIDDLETOWN, LLC

Present: KRAUSE and PORTER, *Circuit Judges*

1. Motion by Appellant to Take Judicial Notice and for Permission to Include Documents in Joint Appendix;
2. Response by Appellee Beebe Medical Center to Motion to Take Judicial Notice and for Permission to Include Documents in Joint Appendix;
3. Joinder by Appellee Wilson C. Choy, MD in Response by Appellee Beebe Medical Center;
4. Joinder by Appellee Encompass Health Rehabilitation Hospital in Response by Appellee Beebe Medical Center;
5. Reply by Appellant In Support of Motion to Take Judicial Notice and for Permission to Include Documents in Joint Appendix.

Respectfully,
Clerk/tmm

ORDER

The foregoing Motion is **GRANTED**.

By the Court,
s/David J. Porter
Circuit Judge

Dated: August 21, 2023

Tmm/cc: Audrey J. Copeland, Esq.
Matthew P. Donelson, Esq.
John Elzufon, Esq.
Samuel I. Ferenc, Esq.
R. Stanton Jones, Esq.
Jessica L. Reno, Esq.
Colleen D. Shields, Esq.
Andrew Tutt, Esq.